

DIVERSITY OF CITIZENSHIP JURISDICTION/ MAGISTRATES REFORM—1979

HEARINGS
BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
FIRST SESSION
ON
H.R. 1046 and H.R. 2202
DIVERSITY OF CITIZENSHIP JURISDICTION/MAGISTRATES
REFORM—1979

FEBRUARY 28, MARCH 1 AND 8, 1979

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DIVERSITY OF CITIZENSHIP JURISDICTION/ MAGISTRATES REFORM—1979

WEDNESDAY, FEBRUARY 28, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:15 a.m., in room 2226 of the Rayburn House Office Building; Hon. Robert W. Kastenmeier [chairman of the subcommittee], presiding.

Present: Representatives Kastenmeier, Matsui, Railsback, and Sawyer.

Also present: Michael J. Remington, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order. I am assuming other members will be here shortly. There are members of this committee who have a number of conflicts this morning. The majority party is having its caucus which may cause us at some point to recess. In the event there is a caucus vote, it would be noticed in this room on the clock as though it were an ordinary vote of the House.

This morning we commence hearings on two important pieces of legislation which passed the House of Representatives during the 95th Congress. H.R. 2202 is a bill to abolish the diversity of citizenship jurisdiction of the Federal courts, and further to abolish the amount of controversy requirement in Federal question cases. This bill is the same as H.R. 9622 which passed the House on February 28, 1978, by a vote of 266 to 133.

H.R. 1046 is a bill to clarify and expand the civil and criminal jurisdiction of U.S. magistrates. This is the same as S. 1613, which passed on October 4, 1978, by a vote of 323 to 49; except in the latter House-passed form, S. 1613 contained a section abolishing diversity of citizenship jurisdiction. H.R. 1046 does not contain this floor amendment. At this point, without objection, I would like to insert H.R. 1046 and H.R. 2202 in the hearing record.

[The bills referred to follow:]

96TH CONGRESS
1ST SESSION

H. R. 1046

To improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 18, 1979

Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. DANIELSON, Mr. MAZZOLI, Mr. SANTINI, Mr. McCLOY, and Mr. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this act may be cited as the "Magistrate Act of 1979".

4 SEC. 2. Section 636 of title 28, United States Code, is
5 amended—

6 (1) by redesignating subsections (c) through (f)
7 thereof as subsections (d) through (g), respectively; and

1 (2) by inserting immediately after subsection (b)
2 thereof the following new subsection:

3 “(c) Notwithstanding any provision of law to the
4 contrary—

5 “(1) Upon the consent of the parties, a full-time
6 United States magistrate may conduct any or all pro-
7 ceedings in a jury or nonjury civil matter and order the
8 entry of judgment in the case, when specially desig-
9 nated to exercise such jurisdiction by the district court
10 or courts he serves. When there is more than one
11 judge of a district court, the designation shall be by the
12 concurrence of a majority of all the judges of such dis-
13 trict court, and when there is no such concurrence,
14 then by the chief judge.

15 “(2) If a magistrate is designated to exercise civil
16 jurisdiction under paragraph (1) of this subsection, the
17 clerk of court shall notify the parties of their right to
18 consent. The decision of the parties shall be communi-
19 cated to the clerk of court. No district judge shall be
20 informed of the parties’ response to this notice, nor
21 shall he attempt to persuade or induce any party to
22 consent to reference of any civil matter to a magis-
23 trate.

24 “(3) Upon entry of judgment in any case referred
25 under paragraph (1) of this subsection, an aggrieved

1 party may appeal on the record to the district court in
2 the same manner as on an appeal from a judgment of
3 the district court to a court of appeals. Wherever pos-
4 sible the local rules of the district court and the rules
5 promulgated by the conference shall endeavor to make
6 such appeal expeditious and inexpensive. The district
7 court may affirm, reverse, modify, or remand the mag-
8 istrate's judgment.

9 “(4) Cases in the district courts under paragraph
10 (3) of this subsection may be reviewed by the appropri-
11 ate United States court of appeals by writ of certiorari
12 granted upon the petition of any party to any civil
13 case, before or after rendition of judgment or decree.
14 Nothing in this paragraph shall be construed to be a
15 limitation on any party's right to seek review by the
16 Supreme Court of the United States pursuant to sec-
17 tion 1254 of this title.

18 “(5) Notwithstanding the provisions of paragraphs
19 (3) and (4) of this subsection, at the time of reference
20 to a magistrate by the clerk of court under paragraph
21 (2) of this subsection, the parties may further consent
22 to appeal directly to the appropriate United States
23 Court of Appeals in the same manner as an appeal
24 from any other judgment of a district court. In this cir-
25 cumstance, the consent of the parties allows a magis-

trate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation on any party's right to seek review by the Supreme Court of the United States pursuant to section 1254 of this title.

“(6) Any proceeding conducted by a United States magistrate under this subsection shall be taken down by a court reporter appointed pursuant to section 753 of this title, if a district judge in such a proceeding would have been provided a court reporter under section 753, unless the parties with the approval of the judge or magistrate agree specifically to the contrary. Reporters referred to in the preceding sentence may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such district court.”.

SEC. 3. (a) Section 631(a) of title 28, United States Code, is amended by adding immediately after the first sentence thereof the following: “All magistrates shall be appointed pursuant to standards and procedures established by law.”.

1 (b) The first sentence of section 631(b) of title 28,
2 United States Code, is amended (1) by inserting "reappointed
3 to" immediately after "appointed or"; and (2) by striking out
4 the colon after "unless" and inserting in lieu thereof "he has
5 been a member of a bar of the highest court of a State, the
6 District of Columbia, the Commonwealth of Puerto Rico, or
7 the Virgin Islands of the United States for at least five years:
8 *Provided also:*".

9 (c) Paragraph (1) of section 631(b) of title 28, United
10 States Code, is amended by striking after the word "require-
11 ments" the words "of the first sentence of this paragraph"
12 and inserting in lieu thereof the words "of this subsection".

13 (d) Section 631(b)(2) of title 28, United States Code, is
14 amended to read as follows:

15 "(2) He is selected pursuant to the recommendation of a
16 Magistrate Selection Panel (hereinafter referred to as the
17 'Panel') established in each district by the district court:

18 "(A) The Panel shall be selected by the judges of
19 the district court when a magistrate position is created
20 or at a reasonable time before the term of such a posi-
21 tion expires or an existing position becomes vacant.
22 The Panel shall be composed of no fewer than five
23 members, and its size shall be determined by the chief
24 judge of the district court. A majority of the Panel
25 shall be members of the bar, and at least one of the

1 remaining members shall be a nonlawyer. Each
2 member of the Panel shall be a resident of the district
3 for which the appointment is to be made. In selecting
4 members of the Panel, the judges of the district court
5 shall insure that a cross section of the legal profession
6 and the community is represented. The Chairman of
7 the Panel shall be chosen by a majority vote of its
8 members.

9 “(B) The Panel shall (i) give public notice in a
10 manner designed to inform the widest possible segment
11 of the legal profession of the vacancy throughout the
12 district, inviting suggestions as to potential nominees;
13 (ii) conduct inquiries to identify potential nominees; (iii)
14 conduct inquiries to identify those persons among the
15 potential nominees who are well qualified to serve as
16 magistrates; and (iv) report to the district court within
17 ninety days after the Panel’s creation the results of its
18 activities and recommend at least three, and not more
19 than five, persons whom the Panel considers best
20 qualified to fill the vacancies, using the criteria estab-
21 lished by this chapter and any such criteria as the con-
22 ference may from time to time promulgate: *Provided,*
23 *however,* a Panel may recommend, with the concur-
24 rence of the district judges, one individual who is a sit-

1 ting magistrate up for reappointment. All decisions of
2 the Panel shall be by majority vote of the members.

3 “(C) The district court shall select from the list
4 provided by the Panel. However, a district court may,
5 by majority vote, reject the first list submitted by the
6 Panel. If such list is rejected, however, the Panel shall
7 submit a second list in accordance with this section
8 from which the district court shall then select its
9 magistrate.

10 “(D) No person shall be considered by a Panel as
11 a potential nominee while serving as a Panel member
12 or during a period of one year after termination of such
13 service.

14 “(E) All information made available to the mem-
15 bers of the Panel in the performance of their duties and
16 all recommendations made to the district court shall be
17 kept confidential.

18 “(F) Congress (i) takes notice of the fact that
19 women and minorities are underrepresented in the
20 Federal judiciary relative to the population at large;
21 and (ii) recommends that the Panel, in recommending
22 persons to the district court, shall give due considera-
23 tion to qualified women, blacks, Hispanics, and other
24 minority individuals.

1 A district court which cannot meet the procedural require-
2 ments of this paragraph, for good cause shown, may appoint
3 a part-time magistrate pursuant to its own publicized proce-
4 dure, after having filed with the conference the reasons for
5 not being able to comply with the requirements of this
6 paragraph.”

7 (e) The amendments made by this section shall take
8 effect on the date of enactment.

9 SEC. 4. Section 633(c) of title 28, United States Code,
10 is amended by striking the final sentence.

11 SEC. 5. (a) Section 633 of title 28, United States Code,
12 is amended by adding at the end thereof the following new
13 subsection:

14 “(d) REPORTS BY THE DIRECTOR.—The Director
15 shall, within two years immediately following the date of en-
16 actment of the Magistrate Act of 1978, conduct a study and
17 report to the Congress with respect to (1) the professional
18 qualifications of individuals appointed under section 631 of
19 this chapter to serve as magistrates, (2) the number of
20 matters in which the parties consented to the exercise of
21 jurisdiction by a magistrate pursuant to section 636(c) of this
22 chapter, and (3) the number of appeals taken pursuant to
23 paragraphs (3), (4), and (5) of such section 636(c), and the
24 disposition of each such appeal. Thereafter, the Director shall

1 conduct a study and report to each Congress with respect to
2 the matters set forth in this subsection.”.

3 (b) The heading for section 633 of title 28, United
4 States Code, is amended by inserting “; Reports by the Di-
5 rector” immediately after “magistrates”.

6 (c) The item relating to section 633 in the table of chap-
7 ters of chapter 43 of title 28, United States Code, is amended
8 by inserting “; Reports by the Director” immediately after
9 “magistrates”.

10 SEC. 6. Section 1915(b) of title 28, United States Code,
11 is amended to read as follows:

12 “(b) Upon the filing of an affidavit in accordance with
13 subsection (a) of this section, the court may direct payment
14 by the United States of the expenses of (1) printing the
15 record on appeal in any civil or criminal case, if such printing
16 is required by the appellate court; (2) preparing a transcript
17 of proceedings before a United States magistrate in any civil
18 or criminal case, if such transcript is required by the district
19 court, in the case of proceedings conducted under section
20 636(b) of this title or under section 3401(b) of title 18, United
21 States Code; and (3) printing the record on appeal if such
22 printing is required by the appellate court, in the case of
23 proceedings conducted pursuant to section 636(c) of this title.
24 Such expenses shall be paid when authorized by the Director
25 of the Administrative Office of the United States Courts.”.

1 SEC. 7. Section 3401 of title 18, United States Code, is
2 amended—

3 (1) by amending subsection (a) to read as follows:

4 “(a) When specially designated to exercise such jurisdic-
5 tion by the district court or courts he serves, any United
6 States magistrate shall have jurisdiction to try persons ac-
7 cused of, and sentence persons convicted of, misdemeanors
8 committed within that judicial district.”;

9 (2) in subsection (b)—

10 (A) by striking out “minor offense” and in-
11 serting in lieu thereof “misdemeanor”;

12 (B) by striking out “such judge” and insert-
13 ing in lieu thereof “a district judge or magis-
14 trate”;

15 (C) by striking out “both”; and

16 (D) by striking out “and any right to trial by
17 jury that he may have”;

18 (3) by adding at the beginning of subsection (d)
19 the following: “A magistrate may impose sentence and
20 exercise all powers under chapter 402 of this title:
21 *Provided, however,* That no such sentence shall include
22 a commitment for a period in excess of one year for
23 conviction of a misdemeanor or six months in other
24 cases.”; and

25 (4) by amending subsection (f) to read as follows:

1 “(f) For good cause shown the attorney for the Govern-
2 ment may petition the district court to have proceedings in
3 any misdemeanor case conducted before a district judge
4 rather than a United States magistrate. Such petition should
5 note the novelty, importance, or complexity of the case, or
6 other pertinent factors, and be filed in accordance with regu-
7 lations promulgated by the Attorney General. Nothing in this
8 subsection shall be deemed to limit the discretion of the court
9 to have any misdemeanor case tried by a district judge rather
10 than a magistrate.”.

11 SEC. 8. (a) The heading for section 3401 of title 18,
12 United States Code, is amended by striking the words
13 “Minor offenses” and inserting in lieu thereof “Misdemean-
14 ors”.

15 (b) The item relating to section 3401 in the table of
16 sections of chapter 219 of title 18, United States Code, is
17 amended by striking the words “Minor offenses” and insert-
18 ing in lieu thereof “Misdemeanors”.

19 SEC. 9. No additional funds are authorized to be appro-
20 priated to implement the provisions of this Act for expendi-
21 ture prior to October 1, 1979.

22 SEC. 10. Such sums as may be necessary to carry out
23 the purposes of this Act are hereby authorized to be appro-
24 priated for expenditure on or after October 1, 1979.

96TH CONGRESS
1ST SESSION

H. R. 2202

To abolish diversity of citizenship as a basis of jurisdiction of Federal District courts, to abolish the amount in controversy requirement in Federal question cases, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 15, 1979

Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. BROOKS, Mr. EDWARDS of California, Mr. DANIELSON, Mr. DRINAN, Mr. HUGHES, Mr. GUDGER, Mr. SANTINI, Mr. BEILENSEN, Mr. BENNETT, Mr. JACOBS, Mr. AKAKA, Mr. MCCLODY, Mr. RAILSBACK, Mr. BUTLER, and Mr. SAWYER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To abolish diversity of citizenship as a basis of jurisdiction of Federal District courts, to abolish the amount in controversy requirement in Federal question cases, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That (a) subsections (a) and (b) of section 1332 of title 28,
- 4 United States Code, are amended by striking out "\$10,000"
- 5 and inserting in lieu thereof "\$25,000".

I—E

1 (b) Section 1332(a) of title 28, United States Code, is
2 amended by striking out paragraph (1) and by redesignating
3 paragraphs (2) through (4), and all references thereto, as
4 paragraphs (1) through (3), respectively.

5 (c)(1) The section heading for section 1332 of title 28,
6 United States Code, is amended by striking out "Diversity of
7 citizenship" and inserting in lieu thereof "Alienage".

8 (2) The item relating to section 1332 in the table of
9 sections for chapter 85 of title 28, United States Code, is
10 amended by striking out "Diversity of citizenship" and in-
11 serting in lieu thereof "Alienage".

12 SEC. 2. (a) Section 1331 of title 28, United States
13 Code, is amended to read as follows:

14 **"§ 1331. Federal question**

15 "The district courts shall have original jurisdiction of all
16 civil actions wherein the matter in controversy arises under
17 the Constitution, laws, or treaties of the United States."

18 (b) The item relating to section 1331 in the table of
19 sections for chapter 85 of title 28, United States Code, is
20 amended by striking out "; amount in controversy; costs".

21 SEC. 3. (a)(1) Section 1332(c) of title 28, United States
22 Code, is amended by striking out "section 1441" and insert-
23 ing in lieu thereof "section 1335".

1 (2) Section 1332(d) of title 28, United States Code, is
2 amended by inserting immediately after “section” the follow-
3 ing: “and section 1335 of this title”.

4 (b)(1) Section 1335(a)(1) of title 28, United States Code,
5 is amended by striking out “, of diverse citizenship as defined
6 in section 1332 of this title,” and inserting in lieu thereof “of
7 diverse citizenship”.

8 (2) Section 1335 of title 28, United States Code, is
9 amended by adding at the end thereof the following new sub-
10 section:

11 “(c) For purposes of this section, the term ‘claimants of
12 diverse citizenship’ means claimants who are—

13 “(1) citizens of different States;

14 “(2) citizens of a State and citizens or subjects of
15 a foreign state;

16 “(3) citizens of different States and in which citi-
17 zens or subjects of a foreign state are additional par-
18 ties; or

19 “(4) a foreign state, as defined in section 1603(a)
20 of this title, and citizens of a State or of different
21 States.”.

22 (c) Section 1342(1) of title 28, United States Code, is
23 amended by striking out “diversity of citizenship” and insert-
24 ing in lieu thereof “alienage”.

1 (d)(1) Section 1391(a) of title 28, United States Code, is
2 amended—

3 (A) by striking out “wherein jurisdiction is
4 founded only on diversity of citizenship”; and

5 (B) by striking out “in which the claim arose”
6 and inserting in lieu thereof “in any judicial district in
7 which a substantial part of the events or omissions
8 giving rise to the claim occurred, or a substantial part
9 of property that is the subject of the action is
10 situated”.

11 (2) Subsection (b) of section 1391 of title 28, United
12 States Code, is repealed, and subsections (c) through (f) of
13 such section, and all references thereto, are redesignated as
14 subsections (b) through (e), respectively.

15 (e) Subsection (b) of section 1441 of title 28, United
16 States Code, is repealed, and subsections (c) and (d) of such
17 section, and all references thereto, are redesignated as sub-
18 sections (b) and (c), respectively.

19 (f)(1) Section 23(a) of the Consumer Product Safety Act
20 (15 U.S.C. 2072(a)) is amended—

21 (A) by striking out “subject to the provisions of
22 section 1331 of title 28, United States Code as to the
23 amount in controversy,”; and

24 (B) by striking out the period at the end thereof
25 and by inserting in lieu thereof “: *Provided*, That the

1 matter in controversy exceeds the sum or value of
2 \$10,000, exclusive of interest and costs, except that no
3 such sum or value shall be required in any such action
4 brought against the United States, any agency thereof,
5 or any officer or employee thereof in his official
6 capacity.”.

7 (2) Section 23 of the Consumer Product Safety Act (15
8 U.S.C. 2072) is amended by redesignating subsection (b) as
9 subsection (c) and by inserting immediately after subsection
10 (a) the following new subsection:

11 “(b) Except when express provision therefor is other-
12 wise made in a statute of the United States, where the plain-
13 tiff is finally adjudged to be entitled to recover less than the
14 sum or value of \$10,000, computed without regard to any
15 setoff or counterclaim to which the defendant may be ad-
16 judged to be entitled, and exclusive of interests and costs, the
17 district court may deny costs to the plaintiff and, in addition,
18 may impose costs on the plaintiff.”.

19 SEC. 4. The amendments made by this Act shall apply
20 to any civil action commenced on or after the date of enact-
21 ment of this Act.

Mr. KASTENMEIER. The jurisdiction of the Federal judicial system, with the exception of that of the Supreme Court, is almost entirely permissive. Article III of the Constitution merely provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. It is, therefore, well within the constitutional authority of Congress to legislate within the two areas we are considering this morning.

Before greeting this morning's witnesses, I would like to refer back to the meetings held in the 95th Congress on diversity of citizenship jurisdiction and magistrates reform. Hopefully, the hearings that we are holding today and tomorrow will build on the solid foundation set during those hearings. In particular, on the issue of diversity of citizenship jurisdiction, I would like to refer back to the testimony of Hon. Henry J. Friendly, Prof. Charles Alan Wright, and John P. Frank, Esq., all of which occurred on September 29, 1977. These gentlemen really framed the pertinent issues involved.

On the issue of magistrates reform, the statements of Joseph T. Tydings, Daniel J. Meador, Hon. Charles Metzner, and Hon. Otto Skopil, Jr., are especially pertinent. I also would like to note that during the recess between Congresses, five members of this subcommittee, not including the chairman, traveled to England and witnessed firsthand the functioning of the Master's system. The English Masters provide the analog for the American magistrate system. I hope that these members will draw upon their comparative experience while processing the Magistrate Act of 1979.

I should note that yesterday four members of the House Judiciary Committee (Chairman Rodino, Mr. McClory, Mr. Railsback, and myself) were invited down to the White House where we heard President Carter announce a comprehensive program to improve the Federal civil justice system. The President, in his formal message to the Congress, had eloquent thoughts on the two pieces of legislation before us today. Since this is noteworthy and much appreciated by the sponsors, I would like to insert the text of his message in the hearings record.

[The message follows:]

From : Office of the White House Press Secretary.

THE WHITE HOUSE,
February 27, 1979.

To the Congress of the United States:

Today I am announcing my program to reform the Federal civil justice system. My proposals are intended to increase the efficiency, cut the cost, and maintain the integrity of our Federal courts. I hope that the same spirit of cooperation which led to the 95th Congress' passage of historic civil service reform legislation, which had similar goals for the Executive Branch, will mark Congressional-Administration efforts in reforming the Judicial Branch.

The American system of justice—and the part our Federal courts play in it—has long been the envy of people throughout the world. An impartial and talented judiciary protects the rights of all Americans, ensuring due process guarantees and fair adjudication of disputes. But the courts cannot perform their traditional and essential function if they are required to operate with inadequate resources, saddled with outmoded procedures, and burdened with more business than they can fairly dispose of within a reasonable time. Nor can our citizens avail themselves of their "day in court" if, as is too often true in these days of rising litigation expenses, the price of participation in litigation is beyond their means.

Delay and expense play a part in our civil justice system. We have long recognized that justice delayed is justice denied. For many injured parties, having to

wait a year or two to obtain legal relief in the courts is extremely harmful. The benefits of a legal victory are sometimes outweighed by the costs of achieving it. As litigation expenses and the size of court dockets increase, this seems to be happening with increasing frequency. Legal redress should not consume years of time and thousands of dollars.

These problems are not merely the special concern of a particular economic class or racial group, nor are they limited to certain geographic regions; they affect all segments of American society, in all areas of the country.

I am committed to improving access to justice by ensuring that every person involved in a legal controversy has a readily available forum in which that controversy can be resolved speedily, fairly, and at reasonable cost. To achieve this goal, we must do two things. First, we must develop new means for handling disputes that do not necessarily require full court resolution. Second, we must provide the courts with sufficient resources and improved procedures so that they can function fairly and effectively in those cases that must be brought before them.

I know that the Congress shares my concerns and is equally committed to taking effective remedial action. Last year the Congress made an excellent beginning when it created 152 new Federal judgeships and carefully reviewed a number of other legislative proposals designed to improve the administration of justice. But unless we improve the system of justice itself, we may find that the additional judges have been swallowed up by outmoded procedures and by an ever-rising volume of cases. We must take prompt and effective steps to eliminate the remaining obstacles to efficiency in the justice system, and to increase access to Federal courts by those with Federal claims.

Five of the specific measures by which we hope to accomplish these ends have previously been proposed, in whole or part, by my Administration, in the 95th Congress, dealing with arbitration, United States magistrates, the diversity of citizenship jurisdiction of the Federal courts, the Supreme Court's obligatory jurisdiction, and minor dispute resolution. Both before and during the last legislative session, each of these proposals received a great deal of careful Congressional thought and attention. They are introduced again, some with modifications discussed in the last Congress. Each is now ripe for favorable action.

The arbitration proposal would provide an innovative means for resolving speedily, fairly, and at reduced cost certain types of civil cases in which the main dispute is over the amount of money that one person owes to another. This legislation is modeled on court-annexed arbitration plans that have proved successful in several States, including Ohio, Pennsylvania and New York. It would allow Federal district courts to adopt a procedure requiring that tort and contract cases involving less than \$100,000 be submitted to arbitration. This approach has been tested since early last year in three Federal courts and the experiences so far have been quite promising. Both litigants and the courts are benefiting from the procedure. Cases going to arbitration are being resolved faster than they otherwise could be and at significantly less expense to the parties. It is time that these benefits were extended to litigants in all Federal trial courts.

The second major element of our comprehensive civil justice program is a bill to enlarge the civil and criminal jurisdiction of Federal magistrates. These judicial officers, who are appointed by the district courts, constitute a potential resource of great value. If magistrates were given broader authority to decide civil cases and to handle less serious criminal matters, as we have proposed, the capacity of the Federal courts would be substantially increased. The result, especially in districts which currently have large case backlogs, would be speedier and less costly dispositions for the litigants.

The third measure that we regard as essential to improving the civil justice system would curtail the exercise of diversity of citizenship jurisdiction in the Federal courts. Too many cases now jamming the dockets in Federal courts involve solely issues of State law that would be more properly and more efficiently disposed of in State courts. The historical basis for permitting these claims to be heard in Federal court—presumed prejudice towards citizens of one State in the courts of another—no longer appears valid. Moving these State law cases to the State courts where they belong would not create an undue burden on any State, but would enable the Federal courts to concentrate on serving the needs of those whose disputes involve questions of Federal law. Under my proposal, diversity jurisdiction would be abolished totally and cases could be brought in Federal court only where Federal law is involved.

The next component of our judicial reform package is a bill that would permit the Supreme Court to exercise greater control over its own docket. By eliminating the Supreme Court's mandatory jurisdiction, except for appeals in three-judge cases, this proposal would do away with the artificial and out-dated distinction between discretionary review and review of right. The change would enable the Court to focus its limited resources on the cases and issues truly deserving of its attention. This, in turn, would permit speedier clarification of the law, to the benefit not only of litigants in the lower courts but also persons wishing to avoid legal controversies.

The last of the proposals carried over from the previous Congress is a bill to improve the means available to the people of the United States for resolving everyday disputes, such as complaints by neighbors, customers, tenants, and family members. Everyday problems, small or large, if left unsettled, can fester and grow. They can lead to breakdowns in otherwise harmonious neighborhood relationships. They can even lead to crime. This legislation, entitled the Dispute Resolution Act, would provide Federal assistance to the States to improve the institutions that deal with these programs. The programs established by this bill would promote improvements in small claims courts and more widespread use of Neighborhood Justice Centers, a new concept that the Department of Justice is presently testing in Los Angeles, Kansas City, and Atlanta. This legislation would enable the Federal and State governments to work in partnership to improve the delivery of justice to all the people of the United States. No additional funding is being sought; existing funds in the Law Enforcement Assistance Administration will be used to finance these programs.

Passage of these five bills would be a major step in eliminating excessive delays, red tape, and exorbitant costs within the civil justice system. These bills have been discussed in the 95th Congress, and I hope that after further careful examination these bills will be enacted during the 96th Congress. These measures are necessary if we are to derive maximum benefit from the newly authorized judgeships. We will work for their enactment.

In addition to these bills, the Attorney General will transmit to Congress additional proposals to improve the courts which have been developed in consultation with Congressional leaders in this area. These new measures would solve a variety of problems relating to administration of the Federal judiciary, as well as practice and procedure in the courts in the following ways:

(a) Create a new intermediate Federal appellate court on the same tier as the existing courts of appeals. The new court, which would be known as the "United States Court of Appeals for the Federal Circuit", would be formed by merging the Court of Claims and the Court of Customs and Patent Appeals into a single appellate tribunal with expanded, nationwide jurisdiction for appeals in patent and trademark cases as well as other matters.

This new forum would induce economies from the combination of the two existing courts. Most important, however, it would expand the Federal judicial system's capacity for definitive adjudication of national law and thereby contribute to the uniformity and predictability of legal doctrine in these areas, which have long been marked by inconsistent appellate decisions, encourage industrial innovation, and in the long run reduce patent and trademark litigation. I further note that a similar need exists for uniformity and predictability of the law in the tax area, where conflicting appellate decisions encourage litigation and uncertainty. The Justice and Treasury Departments will work with Congress to develop an appropriate solution.

(b) Permit more effective means of rulemaking and administration within the Federal judiciary through the implementation of two proposals. One proposal requires each court of appeals to appoint and advisory committee composed of persons outside the court to make recommendations on the rules of practice and operating procedure within that court. These committees should do much to assist the courts in formulating sounder rules. The other proposal would restructure the membership of the circuit judicial councils, the governing administrative bodies in the eleven judicial circuits. The councils will be made smaller and more efficient and will include district judges in their membership for the first time. If enacted, these proposals will help assure that the Federal courts conduct their business so as to serve the public more effectively.

(c) Allowing equitable interest on claims and judgments. There is a serious backlog in civil litigation. Sometimes years pass between the time of an injury and the granting of a judgment. More years may pass while that judgment is

appealed. Current Federal law is ambiguous about whether and under what circumstances interest may be paid for the period prior to judgment, and permits unrealistically low as well as conflicting rates of interest while the decision is under appeal. Yet such interest may be essential in order to truly compensate the plaintiff or to avoid the unjust enrichment of the defendant. For instance, a plaintiff who is unlawfully deprived of the use of \$20,000 in 1976 and who does not receive a judgment until 1979, could have obtained \$4,500 in those three years by investing the money at 7 percent compounded interest. If a judgment on appeal is entered at a rate well below the prime interest rate, the losing party may well profit from the appeal. The bill proposes that where a defendant knew of his potential liability, interest be awarded for the pre-judgment period where necessary to compensate the plaintiff for his losses or to avoid the unjust enrichment of the defendant. Post-judgment interest rates would no longer be left to inconsistent State laws, but along with the new pre-judgment interest standard, would be based on a nationally uniform rate. Litigants would be encouraged to settle cases, and not drag them out needlessly causing additional expense.

(d) Other measures relating to the sound administration of the Federal judiciary are proposals providing more reasonable terms for chief judges, enhanced integrity for appellate panels, and easier transfer for any case inadvertently stated in the wrong Federal court to the proper court without loss of litigants' rights and with savings of time and money.

Finally, I urge the Congress to give serious consideration to improving procedures for litigating class actions, especially for those cases where the alleged economic injury is widespread and large in the aggregate, yet small in its impact on each individual. The Justice Department will continue to have my support in working with Congress to devise class action procedures which will develop methods for courts to handle these complex cases more effectively and at less cost to the taxpayers and the parties involved.

The members of the Judiciary Committees of both houses have shown outstanding leadership in developing answers to the problems facing the justice system. It is now time for Congress as a whole to take action so that the American people will benefit from a more effective civil justice system.

JIMMY CARTER.

THE WHITE HOUSE, February 27, 1979.

MR. KASTENMEIER. Now I would like to greet this morning's witness. First, I would like to greet the Honorable Elmo Hunter. Judge Hunter has testified before us on a previous occasion. Nonetheless, his credentials bear repetition. Judge Hunter has been a Federal judge in the western district of Missouri since 1965. Before becoming a Federal judge he served as a trial and appellate judge in the Missouri State court system. After being named to the bench, he quickly became active in the Judicial Conference of the United States. In 1969 he was named a member of the Conference's Subcommittee on Judicial Improvements. In 1976 he became chairman of that subcommittee and in March of last year he became chairman of the Committee of Court Administration. Today, Judge Hunter will testify on diversity of citizenship jurisdiction. In this regard, he has appeared before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, addressed the Williamsburg Conference which I attended, and has written a recently published law review article.

With Judge Hunter I would also like to welcome the Honorable Otto R. Skopil, Jr. He was appointed district judge for the District of Oregon in 1972, and Chief Judge in 1976. He is an active member of the Judicial Conference's Committee on the Administration of the Federal Magistrates System. He appeared before this subcommittee during the 95th Congress on the issue of magistrates reform. He is nationally recognized for the use of magistrates in his own court, and he allowed Judiciary Committee staff to witness this firsthand. He has been very cooperative in aiding open and fair consideration of this legislation.

I am going to invite you both to come forward, and I trust that other members will be here shortly. In any event, it is good to have you both with us again. I note that Congressman Moorhead is here and I am sure he also would like to greet Judge Hunter and Judge Skopil. Judge Hunter?

TESTIMONY OF HON. ELMO B. HUNTER, U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI; CHAIRMAN, COMMITTEE ON COURT ADMINISTRATION, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge HUNTER. Thank you. It is my pleasure to be here before you this morning and to be permitted to make these remarks.

Mr. Chairman, the first thing I would like to do, with your approval, is to summarize those remarks which have been filed with the subcommittee in my prepared statement, and request that your record reflect three supplemental and supportive documents as well as the prepared statement.

First are those tables forwarded to Mr. Remington by the administrative office, which provide statistical data for the management year 1978 equivalent to the 1977 management year. The 1977 data is contained in your 95th Congress hearing record, and second a University of Kansas City Law Review article which I have authored on the subject. Also I have a budgetary impact profile prepared by the administrative office in response to your request last month.

The first two supplemental documents have already been filed with Mr. Remington, and with your permission, I file the budgetary impact statement at this time.

Mr. KASTENMEIER. Without objection, these several documents which have been received, and which I am now in receipt of, will be accepted and made part of the record. See appendix II(a).

[Complete statement follows:]

STATEMENT OF HON. ELMO B. HUNTER, U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI; CHAIRMAN, COMMITTEE ON COURT ADMINISTRATION, JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Hunter. By way of background, I am a district court judge in the Western District of Missouri. Since 1969 I have been a member of the Judicial Conference's Committee on Court Administration, and I served as chairman of its Subcommittee on Judicial Improvements from 1976 until January, 1978; since that date I have been Chairman of the Committee on Court Administration.

My service on the Court Administration Committee has been instructive; I believe that, in the nineteen semi-annual meetings which that Committee has held since I joined its membership, there have only been two which have not considered the issues before this subcommittee today. Over the years, it has been the consistent position of the Committee on Court Administration and of the Judicial Conference of the United States that diversity jurisdiction should be severely limited or entirely eliminated. Two years ago the Judicial Conference took the strong position that limitation is not sufficient and that diversity jurisdiction should be entirely eliminated except as it concerns alienage jurisdiction; and of course alienage jurisdiction is jurisdiction between citizens of a state and foreign states or subjects thereof. In addition to the strong endorsement of the Judicial Conference of the United States, it likewise has the strong endorsement of the Chief Justice of the United States, the Attorney General of the United States, and that of many eminent scholars and lawyers, and I might say of course I welcome the President of the United States endorsement you mentioned.

H.R. 2202 in addition to abolishing all diversity jurisdiction except for

alienage jurisdiction also raises the amount in controversy for alienage cases from \$10,000 to \$25,000. Further, H.R. 2202 abolishes totally the amount in controversy requirement for federal question cases. The Judicial Conference has directed me to again express to this subcommittee its continuing strong support of H.R. 2202 and its recommendation that H.R. 2202 be enacted into public law at the earliest date possible. The Judicial Conference is most appreciative of the in depth study made of this bill (then H.R. 9622) in the last session of Congress which resulted in its unanimous endorsement by this subcommittee and its being promptly voted out to the House of Representatives where it was passed on a strong vote.

Mr. Chairman, I would like to present this morning in capsule form the considerations and basis for the recommendation of the Judicial Conference that H.R. 2202, the successor to H.R. 9266, be enacted into public law at the earliest time possible.

Mr. Chairman, in the light of our ever growing nation and the increasing demands on its government, there is, and has been for some time, an ongoing need to examine anew the purpose the Federal courts serve and should serve in our democracy if those courts are to fulfill their constitutional function. This examination must include, as a top priority, a proper jurisdictional balance between the Federal and the State court systems, and an assignment to each system of those cases more appropriate to that system in the light of the basic principles of federalism. The guiding principle is that there should be Federal court jurisdiction where Federal questions are at stake, and State court jurisdiction where State questions are at stake and State courts are available to provide an adequate forum.

I would like to briefly review the subject of Federal diversity jurisdiction to determine how it came to be, the purpose it serves, and whether or not it should remain as a basis for Federal jurisdiction. Such a review must include a recognition of the burden placed on the Federal courts by diversity jurisdiction and consideration of the ability of the State courts to take it over.

Federal diversity jurisdiction is made possible by Article III of our Constitution which was drafted so as to permit, but not to mandate, Federal court jurisdiction based on controversies between citizens of different States and between a State or the citizens thereof and foreign states, citizens or subjects. This grant was not self-executing.

Thus, the Constitution gave to Congress the power and duty to decide if there should be Federal diversity jurisdiction, and to what extent, if any.

At that early hour of our history our courts were quite different from today. In our nation's First Judiciary Act, passed in 1789, Congress created not just one set of inferior courts, but two. Each of the twelve States was given at least one district court. Only a handful of judges were needed to man those few district courts. Congress also created three circuit courts. Judges were provided for the Supreme Court, five in number, and for the District Courts, but the Circuit Courts were given no judges of their own. Instead the Circuit Courts were to hold two sessions each year within the circuit, with the Circuit Court consisting of two judges of the Supreme Court and the District Judge of the district. Population was sparse; travel was very limited; and interstate business was minimal. It was in this setting that, in the First Judiciary Act, Congress created diversity jurisdiction. The grant of that jurisdiction had a de minimis result as indications are that few cases were filed on that basis.

To this day there is no consensus as to why diversity jurisdiction was made a permissive basis of Federal Court jurisdiction; or why Congress opted for it. It was simply not debated or explained at the time.

Scholars, and others, over the years, have endeavored to come up with explanations for the Congressional action taken in 1789. The traditional explanation is a fear that State courts in those early days would be prejudiced against those litigants from out of State. Mr. Justice Marshall mentioned this as a possible explanation in an opinion of *Bank of the United States versus Deveaux* in 1809.

In a thoroughly researched book by the late Mr. Justice Robert H. Jackson, titled *The Supreme Court in the American System of Government*, Harvard University Press, 1955, this enlightening statement is made by Mr. Justice Jackson at page 33:

I quote "The anticipated difference between the federal courts and the local courts must have been in the exercise of the judicial function. We must remember that following the Revolution many state courts were manned by laymen,

and state law and procedure were frequently in an unsettled condition. The colonial and state courts did not enjoy high prestige, and their opinions were not even worthy of publication."

Mr. Justice Jackson further stated in that same book at (page 34) :

"There are so many imponderables involved that I yield to the judgment of men lived at that time that local courts so little guided by law might have been a crude and hostile form for the stranger. I may readily believe that diversity jurisdiction had justifications in the time of its creation without believing that it has justifications now."

Whatever such prejudice as may have existed in 1789, it is generally acknowledged today to be either de minimis or nonexistent. Today our people travel much and freely. They reside first in one State and then in another. They move as their business or personal convenience dictates. Their families, relations, business associates and friends also move often and frequently live in other states. There is no longer any real risk of prejudice based on State of residence. And today it is generally recognized that it is unrealistic to believe that prejudice against a litigant, merely because he or she is a citizen or resident of a different State, is a significant factor in arriving at justice in a case. Today's modern State courts, with their stress on objectivity and fairness, and with their sensitive appellate reviews can be relied on to be free of that type of prejudice.

What then are the arguments for retaining federal diversity jurisdiction? Five professed arguments are offered in recent years against abolishing diversity jurisdiction.

First there is the argument that diversity jurisdiction alone provides a forum for certain cases over which no State court could obtain jurisdiction. This once remote possibility is now nonexistent in the light of our modern State long-arm statutes, and State interpleader statutes, not to mention the Federal interpleader statute, Title 28, United States Code, Section 1335, which H.R. 2202 not only preserves, but quite deliberately improves, by clarifying the definition of "claimants of diverse citizenship" and the ever-continuing legislative and judicial expansion of Federal question jurisdiction. These assure that a federal forum will always be available, even in the absence of Federal diversity jurisdiction.

A second reason sometimes mentioned is that it is a function of Federal diversity jurisdiction to assure a high level of justice to the traveler or visitor from another State. Since the Supreme Court's landmark decision in *Erie Railroad Co. versus Tompkins* in 1938, the Federal courts are required to apply State law in diversity cases.

The Federal courts in such cases do not, however, authoritatively determine State law; only State courts may do that. Thus, the diversion of State law litigation to Federal tribunals both delays the authoritative development of State law and imposes upon Federal courts the risky laborious and wasteful task of predicting what the State law may be on issues upon which only the State courts may speak with authority. Often the Federal courts anticipate differently from what the State courts later decide. This is not the way to assure justice to the traveler or visitor from another State; it is counterproductive to the process of justice and it is an undesirable and needless interference with State autonomy. Nor is diversity jurisdiction justified in order to encourage free movement and business activity throughout the country. Abolition of diversity jurisdiction in 1979 is irrelevant to free trade and free movement and would not create any impediments to citizens' travel and business.

Now with regard to the Federal courts having to anticipate, or guess, or speculate, what the State law will be. I have been a state court judge for 13½ years and I have been a Federal Court judge for 13½ years. I can assure you that when you leave the State court bench and become a Federal court judge, you do not retain an infallible memory as to just what the State law was. More to the point, State law changes rapidly as society and social needs change. It is, as a practical matter, nearly impossible for a Federal judge to keep abreast of current State law. That's simply because the average Federal judge is doing all he can do to keep abreast of the Federal law and the many changes that occur there and process his docket. So, as a practical matter, a Federal judge after he has been on the Federal bench for a short time, simply is no longer an expert in State law, and he is going to guess wrong in a number of cases. It is not an unusual experience. And, of course, federal appellate judges whose courts cover numerous states are even more exposed to the risk of guessing wrong on state law of states in which they have never resided or practiced.

Additionally, when a case came into the Federal system involving state law it takes a Federal judge a substantially longer period of time to process the case

that his State brother judges take. And that's for the simple reason that the State judges are current on State law, whereas the Federal judge has to go back and painstakingly reeducate himself and come up to date on the particular legal problem. This is time-consuming and a somewhat wasteful effort. It causes a longer period of time for that particular case to move through the Federal system than it would if it had stayed in the State system.

Even so, Mr. Chairman, some believe that the Federal courts are superior, that is, better than the State courts, and, hence should be given jurisdiction. Certainly this attitude is unsupportable as applied to State law problems where State law controls. Such a belief, if carried to its logical conclusion, would result in the placing of all litigation in the Federal court system, and would abolish the State courts of this nation. That, of course, would be absurd. Our State courts today have exclusive jurisdiction over murder cases with the death penalty applicable; they have jurisdiction over crimes calling for sentences up to and including life; they have jurisdiction over our property rights, over our marital rights; over our inheritance rights. Historically they have performed capably and admittedly they have become enormously more competent in the past 14 or 15 years. To say that these State courts are not to be trusted with the trial of an automobile collision event because of happenchance of diversity of citizenship is both shocking and illogical.

Actually, in modern society, diversity jurisdiction simply provides a tactical weapon for lawyers, without advancing the cause of justice. Ingenious attorneys have invented a number of devices both to create and to defeat diversity jurisdiction, as it suits their tactical interests in the particular suit.

Such things as transferring causes of action, assignments for collection purposes only; transferring small interests; changing the State of incorporation; appointing out-of-state administrators and guardians, selecting out-of-state class action representatives are illustrative of tactical or collusive efforts to create or to defeat Federal jurisdiction.

The law books are full of such cases and our Federal courts lose much valuable time and devote substantial attention to the ruling the jurisdictional questions rather than have that time available to be devoted to cases more properly belonging on the Federal court's docket.

Turning to the situation of the lawyers, I call to your attention that the judges are lawyers just as members of this committee are lawyers, and we understand lawyers, or they think they understand us. Of course, lawyers tend to prefer a choice of forums rather than be limited to a single forum. That's just human nature. If they were given a choice of three things, I suspect they would like that better than the choice of two. That, again, is human nature. But those who have examined the entire problem in depth from the standpoint of the public interest usually realize that the price of retaining such a choice of forums is simply too high, because it deprives the citizens of reasonable service and proper and prompt attention in Federal type cases, those being cases where there is no other forum available for them.

The third argument against abolition of diversity jurisdiction is that our State courts will merely be called upon to bear as heavy a burden—perhaps a heavier one—than the Federal courts bear now. I believe that the 1977 resolution passed by the Conference of State Chief Justices in Minneapolis suggests that this argument has a very limited application. I quote from the resolution of the Conference of State Court Chief Justices adopted August 3, 1977: They said, "Our federal court system will continue to be overburdened unless increased recognition is given to the role of state courts. * * * Our state court systems are able and willing to provide needed relief to the federal court system in such areas as: * * * The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts." Certainly, the studies conducted by Senator Burdick when he held hearings on this matter back in 1971, which suggested that the increase in the civil business of State courts of general jurisdiction caused by the elimination of Federal diversity jurisdiction would vary from 1.5 to 2.7 percent show the burden to be overstated. And I refer to Burdick, Diversity Jurisdiction Under American Law Institute Proposals: Its Purpose and Effect on State and Federal Courts, as published in 48 North Dakota Law Rev., 1, 14-15 (Table 4) (1971). I again agree with Chief Justice Robert J. Sheran of Minnesota, president of the Conference of State Chief Justices, who in speaking for that conference last summer again emphasized that the State courts have modernized to that point where they have the tools available that they can handle the additional

case load that will be thrust upon them if diversity jurisdiction is removed through this particular bill.

Surely it is reasonable to believe that the over 8,000 state court judges distributed throughout 50 states can more readily handle these diversity cases numbering (about 32,000) than the less than 500 federal court judges now handling them. This the state court judges can do even if the diversity cases tend to be filed more heavily in one area of the state than in another. In my own State of Missouri, and Missouri has had a history of being very modern in its State practice, we have for a number of years used the assignment system of judges who are not too busy, to those places that have congested dockets. I have no doubt that within the State of Missouri, the additional load that the State courts would undertake, if diversity jurisdiction is abolished, would be handled quite easily because the judges are willing to make the short trips necessary to go to the congested area places, and to give the additional manpower needed to straighten out any case load that might tend to accumulate at those particular places. And in that respect I do not think Missouri is unique.

Another argument advanced against abolition is the one most frequently voiced; the theory that out-of-state parties may be subjected to a prejudice in State courts by virtue of their out-of-state status. Mr. Chairman, as a native of Missouri, a state well known for the special personalities of its citizenry, I would observe that the kind of bias or prejudice contemplated by this particular argument is more an imagined problem than a real one. Of course, many citizens are proud of their native States, yet today I do not believe that pride manifests itself very often in terms of antagonism against citizens of other states.

The historically documented attitudes, which may have originally motivated Congress to create diversity jurisdiction appear to have disappeared. Certainly if they exist to any degree they are de minimis. The United States today as I mentioned is a nation unique in citizenry mobility. The population relocation which has taken place since World War II is well-documented. Our State courts today reflect that movement just as sharply and brightly as they reflect the ever-increasing quality of our State court judges. An ever greater number of our Federal judges are former State court judges. As I mentioned I am one of them, and, if I may add a personal comment, having been a State court judge for 13½ years, during which time I served on all courts of record in my State—I am baffled by the thought that I was prejudiced then but purged of prejudices the day I entered Federal service. Nor do I believe we need fear this kind of prejudice in our jurors. Under existing law, as embodied in the Juror Selection and Service Act approved by this Committee ten years ago, those citizens called for jury duty in Federal courts are drawn basically from the same communities from which State court jurors are drawn and usually by the same or similar methods.

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Finally, I turn to a new but minor argument being offered in support of diversity jurisdiction. It is that Federal diversity jurisdiction renders a federal service in today's society. Of course, it does provide a federal service but an unnecessary and a clearly unaffordable one. Looking at the overall aspect of the situation rather than examining it in a vacuum, providing federal diversity jurisdiction is a *disservice* to the American public who have federal claims to make because it takes away the ability of the federal courts to properly and promptly process those federal cases and claims of citizens who must find the federal courts available and able to handle them.

Mr. Chairman, I believe that in contrast to these five arguments against abolishing diversity jurisdiction the arguments in favor of such abolition are far more compelling.

I turn first to a reason, fully sufficient in itself, why Federal courts should no longer entertain diversity actions. That reason is the tremendous burden which these cases impose upon the limited judge-power of the Federal courts which should be kept free from those cases which only the Federal courts can handle, or which because of their Federal expertise, they can handle significantly better than the courts of a State.

We all know too well that the Federal courts in recent years have experienced an ever-increasing dramatic growth in volume of cases. In only 20 years the num-

ber of civil cases filed in the Federal district and appellate courts has more than doubled. No letdown is in sight. The result is a situation not capable of reasonable resolution simply by the creation of more judgeships, necessary as they are. Some reduction in unnecessary intake is imperative.

Sometimes facts in the form of dry statistics rather than rhetoric best describe the workload of the Federal Judiciary occasioned solely by Federal diversity jurisdiction. In the fiscal year ending June 30, 1978, there were 133,770 civil cases filed in the Federal District Courts of which 30,496, or 23.1 percent were diversity cases. The total civil and criminal cases filed in the Federal District Courts during the 1978 fiscal year was 174,753. Diversity cases comprised approximately 18 percent of all civil and criminal filings. The great bulk of these diversity cases were tort actions, usually personal injury actions and remarkably 14.3 percent of them involving motor vehicle personal injury claims went to full trial.

For some reason diversity cases go to full trial more often than non-diversity cases. About 12 percent of them are actually tried by the court or jury, while only about 7.6 percent of other Federal cases go to full trial. Of the 30,696 diversity cases terminated in management year 1978, 3,649 were actually tried by the Federal district courts.

The burden that diversity imposes on the Federal courts is not fully reflected by the figures on the number of cases commenced. A time study by the Federal Judicial Center in 1969-70 showed that in that year, when diversity cases constituted 26.2 percent of civil filings in the Federal courts, they took 37.9 percent of the time the district judges spent on civil cases. And, there is support for this finding of the Federal Judicial Center in the statistics that show that the percentage of diversity cases reaching trial has consistently been higher than for civil cases generally, as has been the percentage of diversity cases in which there has been a jury trial. I refer you to the article by *Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. pages 317, 323, a (1977) publication.

Thus, diversity cases accounted for about 24 percent of all jury trials and about 64 percent of all civil jury trials. And, remarkably, a very large percent of those tried are appealed, presenting an awesome volume problem to our appellate courts. For example, in 1978 of the some 11,162 civil cases appealed to the circuit court of appeals, 1,796 were diversity cases.

The future is not bright. There was over a 47 percent increase in the number of diversity cases appealed compared to fiscal 1971. The movement seems always to be on the increase.

Clearly, through sheer force of number these diversity cases tend to preempt already overcrowded dockets and to make it very difficult, if not impossible, for the Federal Judiciary to give adequate and necessary time to other Federal cases that do properly belong in the Federal court system and have no other forum.

I know that the members of this committee are not unaware of the abuses to which diversity jurisdiction can lead when ingenious attorneys feel compelled to weigh tactical considerations in serving their clients' particular interests. It is enough to note that such abuses are expensive, in terms of time as well as money. Our Federal judicial system cannot afford that expense. We have too many other cases which only our Federal courts can hear and determine.

A more recent suggestion by those who oppose abolition of diversity jurisdiction is an interchange of practice between the Federal court lawyers and the State court lawyers, and that that interchange they say, should be preserved so that each system may learn from the other. I am sure that there is an interchange of practice among lawyers. But we do not have, in this country today, any rigid group of "Federal lawyers" solely, or any rigid group that are "State lawyers" solely. Most lawyers are able and willing to go into both forums, given the opportunity and the good business that would take them there.

And, even if you abolished diversity, you would still have much of this state-federal interchange among the lawyers. They will still have cases involving the Federal Torts Claim Act, the FEIA, the federal criminal law, our increasing civil rights actions, and greatly increasing Federal questions actions, as well as other sources of federal court cases. So they will be in the Federal courts as well as in State courts regardless of the abolition of diversity.

There will be a continuation of state and federal interchange among the lawyers through such litigation, not to mention the vast amount of such interchange through legal seminars, bar association meetings and law school functions.

This interchange will not stop or be impaired to any appreciable extent if diversity is abolished. So, Mr. Chairman, I believe that on balance, the arguments in support of abolition are far more compelling than those against abolishing diversity jurisdiction.

And to come to the bottom line, as the saying goes, I say that in all aspects of government, throughout the history of our nation there have been numerous and repeated changes in the original laws of our nation to meet the changes occurring in our society. The 1789 laws were never intended to be sacrosanct and to meet the needs of a 1979 society. One hundred and ninety years ago conditions were vastly different. Certain changes of law have had to occur, have often occurred, and need to occur in the future, if our nation and its three branches of government are to survive and properly serve this nation.

Fortunately, under our system of government, the American people can look to their elected representatives, to their Congress to be sensitive to these problem areas where change is needed and to make those changes of law which are meritorious and in the interest of the people of this nation. The very important diversity jurisdiction problem with its adverse effect on the ability of the Federal judicial system to serve the American people obviously has not gone unnoticed or unattended. We are all indebted to this subcommittee for its indepth, ongoing examination of the problem.

Mr. Chairman, H.R. 2202 in the view of the Judicial Conference of the United States, is in the public interest. That is, the interest of the people of this nation. We know that this committee is ever alert to the needs of the people who are served by our State and Federal legal systems, and that you are always striving to improve the judicial process and the quality of justice within this nation.

We are confident that your indepth consideration of the overall position of the State and Federal courts will convince that H.R. 2202 should be enacted into law.

I would like to close with quotations from two very responsible Americans. From Mr. Justice Frankfurter's concurring opinion in *Lumbermen's Mutual Casualty v. Elbert*, a 1954 decision, 75 Supreme Court Reporter 151, 348 U.D. 48. 58-59:

"Madison believed that Congress would return to the state courts judicial power entrusted to the federal courts 'when they find the tribunals of the state established on a good footing.' Can it fairly be said that state tribunals are not now established on a sufficiently 'good footing' to adjudicate state litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the state tribunals not yet be trusted to mete out justice to the nonresident litigants: should resident litigants not be compelled to trust their own state tribunals? In any event, is it sound policy to withdraw from the incentives and energies for reforming state tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid state courts?"

And, from Mr. Justice Jackson in his book entitled, *The Supreme Court in the American System of Justice*, page 38:

"In my judgment, the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states."

I thank you for this opportunity to appear before you and to present the views of the Judicial Conference of the United States.

Judge HUNTER. Thank you, sir. By way of background, although you have mentioned a good deal about it, I am a district court judge in the western district of Missouri. Since 1969 I have been a member of the Judicial Conference's Committee on Court Administration, and I served as chairman of its Subcommittee on Judicial Improvements from 1976 until January 1978. Since that date I have been chairman of the Committee on Court Administration.

My service on the Court Administration Committee has been instructive; I believe that, in the 19 semiannual meetings which that committee has held since I joined its membership, there have only been two which have not considered the issues before this subcommittee

today. Over the years, it has been the consistent position of the Committee on Court Administration and of the Judicial Conference of the United States that diversity jurisdiction should be severely limited or entirely eliminated. Two years ago the Judicial Conference took the strong position that limitation is not sufficient and that diversity jurisdiction should be entirely eliminated except as it concerns alienage jurisdiction. And, of course, alienage jurisdiction is jurisdiction between citizens of a State and foreign states or subjects thereof. In addition to the strong endorsement of the Judicial Conference of the United States, it likewise has the strong endorsement of the Chief Justice of the United States, the Attorney General of the United States, and that of many eminent scholars and lawyers, and I might say, of course, I welcome the U.S. President's endorsement you mentioned.

H.R. 2202 in addition to abolishing all diversity jurisdiction except for alienage jurisdiction also raises the amount in controversy for alienage cases from \$10,000 to \$25,000. Further, H.R. 2202 abolishes totally the amount in controversy requirement for Federal question cases. The Judicial Conference has directed me to again express to this subcommittee its continuing strong support of H.R. 2202 and its recommendation that H.R. 2202 be enacted into public law at the earliest date possible. The Judicial Conference is most appreciative of the indepth study made of this bill (then H.R. 9622) in the last session of Congress, which resulted in its unanimous endorsement by this subcommittee and its being promptly voted out to the House of Representatives where it was passed on a strong vote.

Mr. Chairman, I would like to present, this morning, in capsule form the considerations and basis for the recommendation of the Judicial Conference that H.R. 2202, the successor to H.R. 9266, be enacted into public law at the earliest time possible.

Mr. Chairman, in the light of our ever-growing Nation and the increasing demands on its Government, there is, and has been for some time, an ongoing need to examine anew the purpose the Federal courts serve and should serve in our democracy if those courts are to fulfill their constitutional function. This examination must include, as a top priority, a proper jurisdictional balance between the Federal and the State court systems, and an assignment to each system of those cases more appropriate to that system in the light of the basic principles of federalism. The guiding principle is that there should be Federal court jurisdiction where Federal questions are at stake, and State court jurisdiction where State questions are at stake and State courts are available to provide an adequate forum.

I would like to briefly review the subject of Federal diversity jurisdiction to determine how it came to be, the purpose it serves, and whether or not it should remain as a basis for Federal jurisdiction. Such a review must include a recognition of the burden placed on the Federal courts by diversity jurisdiction and consideration of the ability of the State courts to take it over.

Federal diversity jurisdiction is made possible by article III of our Constitution which was drafted so as to permit, but not to mandate, Federal court jurisdiction based on controversies between citizens of different States and between a State or the citizens thereof and foreign states, citizens or subjects. This grant was not self-executing.

Thus, the Constitution gave to Congress the power and duty to decide if there should be Federal diversity jurisdiction, and to what extent, if any.

At that early hour of our history our courts were quite different from today. In our Nation's First Judiciary Act, passed in 1789, Congress created not just one set of inferior courts, but two. Each of the 12 States was given at least one district court. Only a handful of judges were needed to man those few district courts. Congress also created three circuit courts. Judges were provided for the Supreme Court, five in number, and for the district courts, but the circuit courts were given no judges of their own. Instead the circuit courts were to hold two sessions each year within the circuit, with the circuit court consisting of two judges of the Supreme Court and the district judge of the district. Population was sparse; travel very limited; and interstate business was minimal. It was in this setting that, in the First Judiciary Act, Congress created diversity jurisdiction. The grant of that jurisdiction had a *de minimis* result as indications are that few cases were filed on that basis.

To this day there is no consensus as to why diversity jurisdiction was made a permissive basis of Federal court jurisdiction; or why Congress opted for it. It was simply not debated or explained at the time.

Scholars, and others, over the years, have endeavored to come up with explanations for the congressional action taken in 1789. The traditional explanation is a fear that State courts in those early days would be prejudiced against those litigants from out of State. Mr. Justice Marshall mentioned this as a possible explanation in an opinion of *Bank of the United States versus Deveaux* in 1809.

In a thoroughly researched book by the late Mr. Justice Robert H. Jackson, titled "The Supreme Court in the American System of Government," Harvard University Press, 1955, this enlightening statement is made by Mr. Justice Jackson at page 33, and I quote, "The anticipated difference between the Federal courts and the local courts must have been in the exercise of the judicial function. We must remember that following the Revolution many State courts were manned by laymen, and State law and procedure were frequently in an unsettled condition. The colonial and State courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication."

Mr. Justice Jackson further stated in that same book at page 34, "There are so many imponderables involved that I yield to the judgment of men who lived at that time that local courts so little guided by law might have been a crude and hostile forum of the stranger. I may readily believe that diversity jurisdiction had justification in the time of its creation without believing that it has justifications now."

Whatever such prejudice as may have existed in 1789, it is acknowledged today to be either *de minimis* or nonexistent. Today our people travel much and freely. They reside first in one State and then in another. They move as their business or personal convenience dictates. Their families, relations, business associates and friends also move often and frequently live in other States. There is no longer any risk of prejudice based on State of residence. And today it is generally recognized that it is unrealistic to believe that prejudice against a

litigant, merely because he or she is a citizen or resident of a different State, is a significant factor in arriving at justice in a case. Today's modern State courts, with their stress on objectivity and fairness, and with their sensitive appellate reviews can be relied on to be free of that type of prejudice.

What then are the arguments for retaining Federal diversity jurisdiction? Five professed arguments are offered in recent years against abolishing diversity jurisdiction.

First there is the argument that diversity jurisdiction alone provides a forum for certain cases over which no State court could obtain jurisdiction. This once remote possibility is now nonexistent in the light of our modern State long-arm statutes and State interpleader statutes, not to mention the Federal interpleader statute, title 28, United States Code, section 1335, which H.R. 2202 not only preserves, but quite deliberately improves, by clarifying the definition of "claimants of diverse citizenship" and the ever-continuing legislative and judicial expansion of Federal question jurisdiction. These assure that a Federal forum will always be available, even in the absence of Federal diversity jurisdiction.

A second reason sometimes mentioned is that it is a function of Federal diversity jurisdiction to assure a high level of justice to the traveler or visitor from another State. Since the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins* in 1938, the Federal Courts are required to apply State law in diversity cases.

The Federal courts in such cases do not, however, authoritatively determine State law; only State courts may do that. Thus, the diversion of State law litigation to Federal tribunals both delays the authoritative development of State law and imposes upon Federal courts the risky, laborious and wasteful task of predicting what the State law may be on issues upon which only the State courts may speak with authority. Often the Federal courts anticipate differently from what the State courts later decide. This is not the way to assure justice to the traveler or visitor from another State; it is counterproductive to the process of justice and it is an undesirable and needless interference with State autonomy. Nor is diversity jurisdiction justified in order to encourage free movement and business activity throughout the country. Abolition of diversity jurisdiction in 1979 is irrelevant to free trade and free movement and would not create any impediments to citizens' travel and business.

Now, with regard to the Federal court having to anticipate, or guess, or speculate, what the State law will be, I have been a State court judge for 13½ years and I have been a Federal court judge for 13½ years. I can assure you that when you leave the State court bench and become a Federal court judge, you do not retain an infallible memory as to just what the State law was. More to the point, State law changes rapidly as society and social needs change. It is, as a practical matter, nearly impossible for a Federal judge to keep abreast of current State law. That's simply because the average Federal judge is doing all he can do to keep abreast of the Federal law and the many changes that occur there and process his docket. So, as a practical matter, a Federal judge after he has been on the Federal bench for a short time, simply is no longer an expert in State law, and he is going to guess wrong in a number of cases. It is not an unusual experience. And, of course,

Federal appellate judges whose courts cover numerous States are even more exposed to the risk of guessing wrong on State law of States in which they have never resided or practiced.

Additionally, when a case comes into the Federal system involving State law it takes a Federal judge a substantially longer period of time to process the case than his State brother judges take. And that's for the simple reason that the State judges are current on State law, whereas the Federal judge has to go back and painstakingly reeducate himself and come up to date on the particular legal problem. This is time-consuming and a somewhat wasteful effort. It causes a longer period of time for that particular case to move through the Federal system than it would if it had stayed in the State system.

Even so, Mr. Chairman, some believe that the Federal courts are superior, that is, better than the State courts, and, hence, should be given jurisdiction. Certainly this attitude is unsupportable as applied to State law problems where State law controls. Such a belief, if carried to its logical conclusion, would result in the placing of all litigation in the Federal court system, and would abolish the State courts of this Nation. That, of course, would be absurd. Our State courts today have exclusive jurisdiction over murder cases with the death penalty applicable; they have jurisdiction over crimes calling for sentences up to and including life; they have jurisdiction over our property rights; over our marital rights; over our inheritance rights. Indeed, they covered our conduct from the birth to the grave and after. Historically they have performed capably and admittedly they have become enormously more competent in the past 14 or 15 years. To say that these State courts are not to be trusted with the trial of an automobile collision even because of happenchance of diversity of citizenship is both shocking and illogical.

Actually, in modern society, diversity jurisdiction simply provides a tactical weapon for lawyers, without advancing the cause of justice. Ingenious attorneys have invented a number of devices both to create and to defeat diversity jurisdiction, as it suits their tactical interests in the particular suit.

Such things as transferring causes of action, assignments for collection purposes only; transferring small interests; changing the State of incorporation; appointing out-of-State administrators and guardians, selecting out-of-State class action representatives are illustrative of tactical or collusive efforts to create or to defeat Federal jurisdiction.

The law books are full of such cases and our Federal courts lose much valuable time and devote substantial attention to ruling the jurisdictional questions rather than have that time available to be devoted to cases more properly belonging on the Federal court's docket.

Turning to the situation of the lawyers, I call to your attention that the judges are lawyers, just as members of this committee are lawyers, and we believe we understand lawyers, just as they believe they understand us. Of course, lawyers tend to prefer a choice of forums rather than be limited to a single forum. That's just human nature. If they were given a choice of three things, I suspect they would like that better than the choice of two. That, again, is human nature. But those who have examined the entire problem in depth from the standpoint of the public interest usually realize that the price of retaining such a choice of forums is simply too high, because it deprives the citizens of

reasonable service and proper and prompt attention in Federal type cases, which being cases where there is no other forum available for them.

The third argument against abolition of diversity jurisdiction is that our State courts will merely be called upon to bear as heavy a burden—perhaps a heavier one—than the Federal courts bear now. I believe that the 1977 resolution passed by the Conference of State Chief Justices, in Minneapolis, suggests that this argument has a very limited application. I quote from the resolution of the Conference of State Chief Justices adopted August 3, 1977.

They said:

Our Federal court system will continue to be overburdened unless increased recognition is given to the role of State courts. * * * Our State court systems are able and willing to provide needed relief to the Federal court system in such areas as: * * * The assumption of all or part of the diversity jurisdiction presently exercised by the Federal courts.

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A more recent suggestion by those who oppose abolition of diversity jurisdiction is an interchange of practice between the Federal court lawyers and the State court lawyers, and that that interchange, they say, should be preserved so that each system may learn from the other. I am sure that there is an interchange of practice among lawyers. But we do not have, in this country today, any rigid group of "Federal lawyers" solely, on any rigid group that are "State lawyers" solely. Most lawyers are able and willing to go into both forums, given the opportunity and the good business that would take them there.

And, even if you abolished diversity, you would still have much of this State-Federal interchange among the lawyers. They will still have cases involving the Federal Torts Claim Act, The FELA, the Federal criminal law, our increasing civil rights actions, and greatly increasing Federal questions actions, as well as other sources of Federal court cases. So they will be in the Federal courts as well as in State courts regardless of the abolition of diversity.

There will be a continuation of State and Federal interchange among the lawyers through such litigation, not to mention the vast amount of such interchange through legal seminars, bar association meetings and law school functions.

This interchange will not stop or be impaired to any appreciable extent if diversity is abolished. So, Mr. Chairman, I believe that on balance, the arguments in support of abolition are far more compelling than those against abolishing diversity jurisdiction.

And I come to the bottom line, as the saying goes, and I say that in all aspects of Government, throughout the history of our Nation, there have been numerous and repeated changes in the original laws of our Nation to meet the changes occurring in our society. The 1789 laws were never intended to be sacrosanct and to meet the needs of a 1979 society. One hundred and ninety years ago conditions were vastly different. Certain changes of law have had to occur, have often occurred, and need to occur in the future, if our Nation and its three branches of Government are to survive and properly serve this Nation.

Fortunately, under our system of Government, the American people can look to their elected representatives, to their Congress to be sensitive to these problem areas where change is needed and to make those changes of law which are meritorious and in the interest of the people of this Nation. The very important diversity jurisdiction problem with its adverse effect on the ability of the Federal judicial system to serve the American people obviously has not gone unnoticed or unattended. We are all indebted to this subcommittee for its indepth, ongoing examination of the problem.

Mr. Chairman. H.R. 2202, in the view of the Judicial Conference of the United States, is in the public interest. That is, the interest of the people of this Nation. We know that this committee is ever alert to the needs of the people who are served by our State and Federal legal systems, and that you are always striving to improve the judicial process and the quality of justice within this Nation.

We are confident that your indepth consideration of the overall position of the State and Federal courts will convince that H.R. 2202 should be enacted into law.

I would like to close with quotations from two very responsible Americans. From Mr. Justice Frankfurter's concurring opinion in

Lumbermen's Mutual Casualty v. Elbert, a 1954 decision, 75 Supreme Court Reporter 151, 348 U.D. 48, 58-59:

Madison believed that Congress would return to the State courts judicial power entrusted to the Federal courts "when they find the tribunals of the State established on a good footing." Can it fairly be said that State tribunals are not now established on a sufficiently "good footing" to adjudicate State litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the State tribunals not yet be trusted to mete out justice to the nonresident litigants; should resident litigants not be compelled to trust their own State tribunals? In any event, is it sound policy to withdraw from the incentives and energies for reforming State tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid State courts?

And, from Mr. Justice Jackson in his book titled, "The Supreme Court in the American System of Justice," page 38:

In my judgement, the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the Federal courts which is based solely on the ground that the litigants are citizens of different States.

Mr. Chairman and members of this distinguished subcommittee, I thank you for this opportunity to appear before you and to present the views of the Judicial Conference of the United States.

Mr. KASTENMEIER. Thank you, Judge Hunter, for a very compelling and comprehensive statement. I have some questions which I will defer until after we hear from Judge Skopil. Other members may do the same, or if other members are prepared to ask questions of Judge Hunter, now, I will entertain them. I recognize the gentleman from Michigan.

Mr. SAWYER. Thank you, Mr. Chairman. Judge Hunter, when we get out of the practice of law, which I have and obviously you have, I think we tend to start looking at lawyers' legitimate concerns for their clients as being lawyer's tactics or abuses. I am beginning to feel that way myself and I have only been here 2 years. But, let's look at some of the very practical aspects. I have only been intimately familiar with the western district of Michigan for 2 years. We have eight communities or cities of over 100,000 population, which are quite urban in their orientation. We have a total of 53 counties in the district and some of them are exceedingly rural and very sparsely populated. Now we have a no-fault law in Michigan, so we are not troubled with minor vehicular accidents. I believe it is limited to death or permanent disability as an optional remedy to the court. But if you become involved in a serious accident in one of the northern counties, you draw a jury that I know, from experience, a \$5,000 award would be an impressive one on a matter that in almost any kind of a balanced or urban jury would be ridiculous. Therefore, there is a big difference. If you have a client who sustained serious injuries from a vehicular accident in one of those northern counties, if you have a diversity basis to get into a Federal court which normally sits in Grand Rapids, and would draw a jury from any number of counties, you would get a pretty good cross section of both urban and rural people. The fact is you would end up with a much more realistic result.

Also in Newaygo County, for example, and I cite western Michigan because I am familiar with it, but I am sure there are similar prob-

lems in all the States, we have industries like Gerber Products Co., which is located in Fremont, Mich. which is an exceedingly rural area. Fremont is a small town, and if you have an action involving Gerber Products Co., you are in an unpleasant situation if you have to go into the county of Newaygo with a jury drawn from that county, where you have Gerber Memorial Hospital, Gerber everything, to try your lawsuit. The judge in those small counties usually has lunch once a week at the Rotary Club with all the top hierarchy of Gerber. If you go into Grand Rapids, in the U.S. district court, you get a much broader jury and a judge not as intimately close with a major industry as that.

Now that we have added some 135 judges, which I strongly supported, and we are also talking about greatly broadening the authority and jurisdiction of magistrates, which I also favored, and we have also endowed the bankruptcy court with much broader power, all aimed at relieving the Federal judiciary, do you think in light of some very legitimate considerations, that now is the time to abolish diversity or should we wait and see what these various other helping hands do for the Federal judiciary?

I didn't mean to make a speech. I am just trying to ask an overall question.

Judge HUNTER. I anticipated that would probably be my first question. Obviously, you have had that change of circumstance, but let me make this answer to you. Yes, I think this is still the time for total abolition of diversity jurisdiction and in response to this new factor, which you have mentioned which has occurred, I would simply point out this: First of all, the basis for the determining of how many new Federal judges are needed was made not on any anticipatory basis, but on the workload as it appeared at that time. And no one was given any judge power on the basis of what the future will be. And what that means is that the Federal caseload which has shown an unending totally predictable increase each year, will continue to do that. It will take at least 3 years for the enormous backlog of Federal cases to begin to be worked out in any appreciable amount. We don't have any of these new judges on board yet.

I suppose that you might know better than I how much longer it will be before we have them, but I hear word of 6 months to 1½ years, so even after they come on board, it is going to take them time to help reduce the enormous backlog now facing the Federal court system. So you are really talking about 4 years, 4½ years, and I certainly wouldn't want to be on that side of trying to determine what the problem will be then. And make any contentions about—that by that time the increase in the Federal caseload will not have arrived at the point where every Federal judge presently authorized will be needed.

In other words, there isn't any fat to go on. By the time the Federal judges are aboard and they have helped get rid of the backlog, the volume in the Federal court system will again be at that point where their full time is needed even if you take away diversity jurisdiction.

Mr. SAWYER. Maybe that is what is bothering me. There isn't any fat to go on, now that we have added the 135 judges, are considering broadening the jurisdiction of magistrates, have increased the bankruptcy jurisdiction, and are dumping some criminal jurisdiction.

Judge HUNTER. They are in many places, but you are talking about juries, basically, and composition of juries.

Mr. SAWYER. Yes; I agree with that. But that is academic to the system. If you are in a State court, you are within the county, at least in Michigan, and I assume that in most States the jury is a panel from that county. Since we have not facts, my feeling is that we should wait and see for a couple years what these various changes we are making do in light of some desirability in my mind to diversity. But addressing the question of the unfamiliarity of Federal judges on a day-by-day basis with the State law and changes in the State law, you are going to have it whether you get rid of it in diversity or not. You are going to certainly have a lot of it under pendent jurisdiction theories. So you have to become somewhat diverse. I just want to say that whereas I had a different view on diversity, I am now pretty much on the fence as to whether we ought to abolish it now or whether we ought to wait and see.

As we now have no facts, it seems to me before we change, maybe we ought to see the developments.

Judge HUNTER. I think the statistics are there, Mr. Sawyer, to show that every Federal judge that will come on board will be needed to dispose of the business in the Federal court system, as it now exists. They're going to be hard put to even help put down this backlog that we have accumulated, and I really think that $3\frac{1}{2}$ years from now, if you still have diversity of jurisdiction, you are going to be confronted with taking more things out of the Federal court system that is really not in the interest to the citizens of this country, to have taken out of the system.

You are now talking about taking out of the system Federal matters that properly belong in the Federal court, and any time you have to do that, I think you are enlarging the problem of trying to get a proper balance between the Federal and State court balance. You continue a needless interference with the concept of federalism. You interfere with the States' ability to improve its own system and eliminate its local problems.

Mr. SAWYER. In $4\frac{1}{2}$ years then maybe we could abolish diversity jurisdiction.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. I think Mr. Sawyer's remarks are pertinent, but they seem to me to go to a different question. Let's assume the classic case that he suggests of a small rural county with a major corporation such as the Gerber Co., and a mechanism exists to get a case into Federal court on diversity grounds.

If justice is imperfect in that county, it is imperfect for all those who somehow cannot claim Federal diversity of citizenship jurisdiction. In that sense, would you not agree that this is an uneven application of justice at the local level. The diverting of certain types of cases to the Federal courts, based on a fortuitous circumstance, is certainly not the answer. There ought to be a different response, would you not agree?

Judge HUNTER. I would agree on local problems like that. The problem should be cured locally because it is a local problem. It does plague those who don't have the total \$10,000 involved to be able to advance diversity jurisdiction, and of course, it remains on those who for one reason or another do not assert diversity jurisdiction by the removal process. So, it ought to be cured but ought not to be cured at the cost

of totally putting out of focus the proper balance between the State and Federal systems.

Mr. RAILSBACK. If I could just add a couple of my observations about Mr. Sawyer's questions. I share some of Congressman Sawyer's concern about the small account and possible prejudice or bias. I wonder what percentage of diversity cases that actually reach trial in the Federal court are tried by a jury, and what percentage are tried by the court?

Judge HUNTER. I don't have that figure, so I am unable to answer your question. I am sure I can get it and I am sure it will be supplied to you.

Mr. RAILSBACK. I guess my thought would be that probably a very large percentage of negligence cases would be tried by jury rather than by the court, so that would make a difference.

The other observation I wanted to make, certainly the observation at least in my opinion of Congressman Sawyer, would not apply to the in-State plaintiff filing in his own jurisdiction; is that correct?

Judge HUNTER. It would not apply to that at all.

Mr. RAILSBACK. In that particular case, it may be that a lawyer would personally feel more comfortable with the Federal judge than he would with the particular State court in a small jurisdiction, and then, that in-State plaintiff would perhaps be getting the advantage of a bias.

Judge HUNTER. I don't believe Mr. Sawyer is speaking directly to prejudice because someone is a citizen of another State.

He is speaking more to a prejudice that might exist because it is a large corporation that is influential in the locality.

But that is not the basis of the Federal diversity jurisdiction. That is another subject entirely, and if any one wanted to draft the law to say that you can get into the Federal court if you can prove bias, that would be an entirely different subject.

Certainly, I don't advocate any such a rule or approach to that, because I think it is entirely unnecessary, but that would more precisely meet the situation he is describing.

Mr. KASTENMEIER. Thank you.

Mr. MATSUI. I have no questions, Mr. Chairman. Thank you.

Mr. KASTENMEIER. If not, I will again commend you, Judge Hunter, for your statement and ask Judge Skopil to present his entire statement, or to summarize it.

TESTIMONY OF OTTO R. SKOPIL, JR., CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON; MEMBER, COMMITTEE ON THE ADMINISTRATION OF THE FEDERAL MAGISTRATES SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge SKOPIL. Thank you. My name is Otto Skopil, and I am the chief judge for the district of Oregon. I am a member of the Committee on the Administration of the Magistrates System of the U.S. Judicial Conference. I want to thank you for inviting me to appear this morning. I appeared last year, and I do commend each of you for your early consideration of this bill.

I think this is one of the most important bills we have so far as the judicial process is concerned. I have already submitted a prepared

statement. I also testified last year at this subcommittee hearing on the magistrates' amendments. So I would ask that my testimony from my prior appearance as well as my prepared statement be made part of this record, if I may do that?

Mr. KASTENMEIER. Without objection, I will insert your present statement. Since your previous statement already has been printed, to save taxpayer expense I will refer the reader back to our previously published hearings.

[The statement of Judge Skopil follows:]

PREPARED STATEMENT OF OTTO R. SKOPIL, JR.

My name is Otto R. Skopil, Jr. I am the Chief Judge for the District of Oregon, located in Portland, Oregon. I am a member of the Committee on the Administration of the Magistrates System of the United States Judicial Conference.

I want to express my sincere appreciation to the members of the committee for taking the time to hear the views of a district judge on this important bill. I am a great believer in effective communication between Congress and the courts, so I value this opportunity. I also want to commend the Attorney General, Judge Bell, and his staff for their insight and effort in initiating in 1977 this and other proposed legislation, which I believe will improve the administration of justice.

In the District of Oregon magistrates have become an essential part of our system. They are one of the keys in providing the people of Oregon with a productive and efficient federal court.

History and development

As you know, the magistrate system builds on the preexisting experience of the United States Commissioner system. However, our current magistrate system bears little resemblance to the commissioner system.

U.S. Commissioners were empowered to try petty offenses committed on U.S. property, such as the national parks. Commissioners' trials were authorized only with the consent of the parties.

The commissioner system was often criticized. Commissioners were not required to be members of any bar. They were part time, paid little, and had little administrative support. Appointment was at the discretion of the district judges. The procedure governing the commissioners was uncertain.

In 1968 Congress responded to these criticisms by adopting the Federal Magistrates Act of 1968. The 1968 Act worked fundamental changes in the commissioners system by creating new federal judicial officers called "magistrates". The title "magistrate" was intended to highlight the judicial nature of the position and to emphasize the break with the commissioner system.

An eight-year term of office was established. Removal from office was permissible only for cause. Salaries were raised to the level of bankruptcy referees. The magistrates' criminal jurisdiction was expanded, and they were authorized to assist the district courts in a wide variety of civil and criminal matters. Their new duties were in three basic areas:

- First, all duties formerly exercised by commissioners;
- Second, jurisdiction over "minor" offenses, that is, federal misdemeanors with a limit of one year's imprisonment and a \$1,000 fine; and
- Third, were what Congress called "additional duties", including:
 - Serving as a special master in civil cases;
 - Conducting pretrial and discovery proceedings in civil and criminal cases;
 - Preliminary review of habeas corpus petitions; and
 - "Additional duties".

The last category was added by Congress to insure that magistrates would not be limited to the areas specifically listed in the Act.

The Judicial Conference was given the responsibility of administering the new system. By July 1971 the commissioner system had been replaced by the magistrate system in all the district courts.

Serious jurisdictional questions soon appeared, particularly with respect to the Act's "additional duties" provision. Several appellate courts upheld the delegation of duties to magistrates in a wide range of cases. However, others invalidated referrals, principally because of unclear statutory authority. Although

some courts voiced concern over the constitutionality of references to magistrates, this was not a significant problem. As one court put it, the question involves "not the power of the judge to refer, but the power of the parties to agree to another arbiter, absent overriding constitutional considerations."

Despite the questions raised concerning statutory authority, many districts increasingly expanded the number and range of cases referred to magistrates. This occurred in the District of Oregon.

In 1974 the U.S. Supreme Court ruled in *Wingo v. Wedding* that there was insufficient statutory authority to support the referral of a habeas corpus case to a magistrate for an evidentiary hearing. This decision was one of several factors that provided incentive for amendments to the Magistrates Act. Another important factor was the rapidly growing district court caseloads. The passage of a series of new laws creating new federal causes of action put substantial additional pressure on the district courts. With the passage of the Speedy Trial Act of 1975, civil dockets in many districts ground nearly to a halt.

In October 1976 Congress passed new amendments to the Magistrates Act to clarify the "additional duties" section. The amendments were intended to overrule the appellate decisions that had invalidated references to magistrates under the 1968 Act. The 1976 amendments placed the jurisdiction of magistrates on much firmer ground. The amendments clarified four areas of jurisdiction:

(1) Nondispositive Pretrial Matters. A magistrate has complete authority to determine all pretrial matters referred by a judge, except for eight specific exceptions. The exceptions include such matters as motions to dismiss and motions for summary judgment. A district judge must accept a magistrate's findings in the nondispositive matters unless they are "clearly erroneous" or contrary to law.

(2) Dispositive Pretrial Matters and Prisoner Cases. This category includes the exceptions to which I just referred. A magistrate makes findings and recommendations on these matters. Either party may file within ten days written objections to the magistrates findings. A judge must then determine *de novo* those matters to which there is objection.

(3) Special Master References. A magistrate may serve as a special master in a civil case with the consent of the parties. In exceptional cases a magistrate may be appointed special master without the consent of the parties.

(4) Other duties. In referring to this section Congress made it clear that this section was designed to permit judges to experiment with the use of magistrates with the objective of increasing both the "efficiency and the quality of justice in the Federal courts."

Operation of the system in Oregon

The existing Magistrates Act provides authority for a relatively wide ranging system capable of responding flexibly to the needs of litigants in the federal courts. The system has been used in different ways by different districts. I think it is fair to say that no district has delegated to magistrates more significant cases and functions than has the District of Oregon. Our two magistrates have become critical factors in maintaining the quality of our court.

The District of Oregon has interpreted the Magistrates Act broadly. We interpret the Act to authorize us to refer to magistrates the trial of any civil case—jury or nonjury—with the consent of the parties. We infer this authority not from the special master provision but from the "additional duties" section of the Act, 28 U.S.C. 636(b) (3). Where the parties have so consented, a district judge accepts without review the magistrate's determination of a trial.

To give you an idea of the extent of our use of magistrates, I offer you a brief statistical profile.

Magistrates' statistics

Our magistrates handled more than 2,000 separate matters under the authority conferred by 28 U.S.C. 636(b). This is for the year ending June 30, 1978, as reported by the Director of the Administrative Office of the U.S. Courts. This number does not include matters such as search warrants, arrest warrants, trials of minor and petty offenses, bail and probation hearings, and the other duties performed by our magistrates that are not covered by Section 636(b). I want to concentrate on Section 636(b) matters because that is the area that will be most affected by the proposed amendments. It is also the area which best illustrates the range and complexity of the matters we delegate to our magistrates in Oregon.

All tolled, Oregon magistrates handled 2,173 matters under Section 636(b) authority. 515 of those matters were criminal, including such things as indictments, arraignments, pretrial conferences, motions, probation revocation hearings, and other such matters. 1,658 civil matters were handled. This includes a number of specialized duties such as habeas corpus petitions, social security matters, and prisoner petitions. However, from my perspective the most significant figures in the civil area are the figures for motions, pretrial conferences, and trials in civil cases.

Our magistrates handle the great majority of all the civil motions filed in our court and virtually all other pretrial matters. Last year they considered 1,064 civil motions, 227 of those were dispositive motions, reviewable by a district judge.

The magistrates have assumed a major civil trial responsibility. They conducted 159 pretrial conferences in civil cases last year. These conferences help insure that the cases that reach the courtroom are well prepared and ready for trial. This has helped make the actual trial a more efficient process. The magistrates conducted 61 trials, 25 of those were jury trials and 36 were non-jury. The magistrates' trials cover a full range of subjects, including torts, contracts, admiralty, civil rights, securities law, labor relations, patents, and other cases. The amounts in controversy range up to \$1,000,000. All of these trials were conducted with the consent of the parties.

In short, our magistrates do literally everything in civil cases. They do everything in criminal cases except that their trial jurisdiction is limited. The assistance they render to litigants and to the court is tremendous.

The key to the success of our system has been acceptance by the practicing bar. We have not found it necessary or desirable to pressure lawyers to use magistrates. Rather, the magistrate system has sold itself. Lawyers and litigants know that with current pressures on the federal docket, their matters can be resolved much sooner if they try it before a magistrate. The quality of our two magistrates has also been a significant factor in the bar's willingness to use magistrates.

We have two full-time magistrates. Judge Juba was the first. He has been a member of the bar for more than twenty years and has broad experience. He started out as an FBI agent. He then became an Assistant U.S. Attorney, and later Chief Deputy District Attorney for an Oregon county. He was later appointed to the state trial bench, then clerk of our federal court, and then he was chosen as magistrate.

Judge Leavy has more than twenty years in the legal profession. He was in private practice before being appointed to the state trial bench. He was a trial judge in the state system for eighteen years. He also served as a *pro tem* judge for the Oregon Supreme Court before becoming a magistrate. In two "preference polls" conducted by the Oregon State Bar Association—one for a vacancy on the Oregon Supreme Court and one for the new federal district judgeships—Judge Leavy has been the bar's number one choice.

The caliber of these men has been a most important factor in the success of the magistrate system in Oregon.

The current bill

The amendments you are now considering would make important changes in the statutory authority for the magistrates system. I will discuss what I believe are the three most important areas of change.

First, the amendments would clarify and confirm the authority of magistrates to conduct civil trials and would regulate resulting appeals. In my mind this is the most important amendment of all. Existing authority for civil trial before magistrates can be inferred only from the "additional duties" section of the Magistrates Act. A great many districts are referring civil cases to magistrates for trial under the assumption that the "additional duties" section, by not prohibiting civil trials, impliedly authorizes them. Some districts are reluctant to make this assumption and are waiting for more specific statutory authority before stepping into this important area. Moreover, currently there is no clear authority for a magistrate to enter a final judgment in a civil trial. The proposed amendments would supply the necessary authority.

By clarifying magistrates' authority in these areas, the amendments would encourage broader involvement of magistrates in conducting civil trials.

The proposed amendments would also establish standards governing appeals from decisions of magistrates. Circuit courts have uniformly refused to hear

appeals from the decisions of magistrates. They hold that their jurisdiction is limited to appeals from the judgments of district judges. Both the House and Senate bills would permit the parties to choose whether appeal would lie directly to a court of appeals or to a district court in the first instance.

A second important change is in the area of criminal jurisdiction. The proposed amendments would expand magistrates' jurisdiction to dispose of minor criminal cases by including all federal misdemeanors. The current \$1,000 fine limitation would be removed. This is a logical extension of the magistrates' existing jurisdiction. The amendments would also authorize magistrates to conduct misdemeanor trials before juries. Previously they had no such authority. This created a dilemma for those defendants who were willing to be tried by a magistrate but who were not willing to waive a jury trial. The amendments would also permit magistrates to sentence juveniles under the Youth Corrections Act. The amendments would leave unchanged the current procedure of appeal exclusively to a district judge.

A third area of change would be in the process by which magistrates are selected. The importance of the magistrates makes it essential that those appointed be well qualified. Congress has expressed concern that the quality of magistrates is uneven. I can confirm that our success in Oregon would be impossible without our highly qualified and well-respected magistrates.

Currently magistrates are appointed by a majority of judges in a district with only minimal qualifications required by statute. The proposed amendments would continue the appointive power of the district judges. However, in line with the increased importance of the magistrates, selection criteria would be addressed more extensively in the legislation.

The Senate and House differ in the mechanics of the selection process. The 1977 Senate bill would have established minimum criteria but left it to the Judicial Conference of the United States to develop detailed requirements. The House version would put in the statute itself detailed standards and procedures. The new Senate bill strikes a middle course. It would incorporate the two most significant requirements of the House bill (public notice of vacancies and establishment of selection panels), but would leave it to the Judicial Conference to develop more detailed procedures. In March 1978 the Judicial Conference adopted recommended procedures and guidelines that are in some ways more demanding than the requirements of any of the proposed bills. Of course, these are only recommended guidelines, not mandatory requirements. However, they do illustrate the nature of the Judicial Conference's commitment to merit selection of magistrates.

There are a number of other differences between the House and Senate bills.

In the area of civil trial authority, the Senate bill would confer civil trial authority on both full-time magistrates and part-time magistrates who do not practice law. The House version would confer authority only on full-time magistrates. The Senate's alternative would cover a bankruptcy judge/magistrate who is full-time in the aggregate but only part-time as a magistrate. Both bills avoid potential conflicts of interest that might arise if part-time magistrates presided over trials while maintaining private law practices. The Senate bill, by permitting greater flexibility to the courts, is preferable.

The Senate version requires that court to notify the parties of the option of proceedings before a magistrate but prohibits any attempts to coerce the parties' consent to that procedure. The House version provides specifically for the clerk to notify the parties of the option of proceeding before a magistrate and for the parties to respond to the clerk, without informing the district judge of the responses. Coercion of the parties consent by a district judge is also prohibited. The Senate version is preferable.

The Senate version has no provision for special court reporters for civil trials conducted before magistrates. The House version requires that an official court reporter take down civil trials before magistrates unless the parties and the court waive the requirement. Reporters may be transferred through the circuit for this purpose.

The Senate version has specific authority for a judge to vacate a reference to a magistrate of a civil case for trial. The House version has no specific provision for vacating civil references. The House version is preferable.

The Senate version contains no minimum requirement of bar membership for appointment as a magistrate. The House version requires a minimum of five years of bar membership for appointment as a magistrate, which may be waived for a part-time magistrate. The House version is preferable.

The Senate version includes more information to be provided on magistrates in the reports now filed by the Director. The House version requires the Director to file a new report to discuss only the process of selecting magistrates and the experience with the new civil trial jurisdiction.

The Senate version retains the right of a petty offense defendant to trial by a district judge but requires the accused to demand such a trial. The House version retains the existing requirement that a petty offense defendant must affirmatively waive trial before a district judge, in writing, before the magistrate can hear the case.

The Senate version specifically authorizes a magistrate to conduct proceedings under the juvenile delinquency laws in misdemeanor-type cases. In petty offenses cases initiation of the proceedings is permitted by violation or complaint, and the certification of the Attorney General is not required. In no case may a magistrate commit a juvenile for a period in excess of six months. The House version contains no comparable provision regarding juveniles. The Senate version is preferable.

Conclusion

The modern magistrate system is in its eighth year. In that short time it has clearly demonstrated its potential. It has added a new level of flexibility and creativity to the federal court system. It is not simply a means of stemming a flood of litigation or of reducing judges' caseloads. It is an important resource that enables the federal courts to experiment, to find new ways of meeting the changing needs of litigants. I believe that the magistrate system must finally be measured by the extent to which it improves the quality of justice to the people who must resort to it. To the extent that it serves the needs of those people, it will succeed. I believe it is succeeding now. I suggest that the proposed amendments will enable the magistrates to achieve even greater success.

Judge SKOPIL. It is my sincere desire to be of assistance to the members of the committee. I am a strong believer that the only way we are going to have progress is through communication, and the first step in progress has to be communication. So it is my desire to be of assistance to each of you as far as responding to questions that you may have or in discussing some of the matters of concern to you.

I do feel, and I think Attorney General Bell and his staff have recognized this by the numerous bills that they have introduced during the last 2 years, that our system has to be improved.

We have to be innovative, and we have to be progressive. The amount of litigation increases daily. The litigants are not having their matters concluded within a reasonable period of time, so we do have to be innovative, and we do have to improve our system of justice.

I think the Attorney General has seen this, and his insight is one for which I am grateful. I think the history of the magistrate system probably falls along that same line. Because we know the Magistrate Act is the result of our U.S. Commissioners' duties and responsibilities. I think going back as far as 1940 there was a study made to determine whether or not we should continue with the U.S. Commissioners' approach, or whether we should go ahead and abandon it and put it in the hands of a U.S. district judge or come up with something innovative.

As a result, the Magistrate Act was enacted in 1968. I think Senator Tydings in essence said the purpose of that bill was to go ahead and improve our system—that we have proceeded for about a period of about 100 years in the same way, that times were different, that we should see whether or not there was a better way of doing things.

The basic jurisdictional features of the original 1968 act are very simple. I think we as judges and as attorneys perhaps have made it complex, but I think the intent was very simple at the time.

Basically, it merely gave to the magistrate all the powers and duties that the U.S. Commissioners previously had.

In addition to that, it gave the magistrates the jurisdiction to try and dispose of minor criminal matters. Additional duties were specified: Special master, pretrial matters and discovery, preliminary view of prisoners' petitions, and "such additional duties that are not inconsistent with the Constitution and the laws of the United States." That "additional duties" provision is the reason we are back again for additional clarification.

That is the area in which the courts have some concern. I think it was indicated in the congressional history that it was not the intent by specifying those additional duties that it should be limited to those additional duties. The courts were encouraged to go ahead and experiment, so to speak, within the intent of the 1968 Magistrate Act.

Well, we all know what history has done to us. Jurisdictional uncertainty has developed. The uncertainty has been statutory rather than constitutional. I know of no case except one where the constitutional question has been the problem, and there the problem was discussed in dicta. It's been a statutory question as to whether or not the magistrates had jurisdiction as to a particular thing. I think the *Wingo* case brought the matter back to our attention because the Supreme Court in that case said they did not feel the statute authorized a magistrate to conduct an evidentiary hearing in a habeas corpus case. For that reason the 1976 amendments were adopted to clarify the uncertainty.

I am sure you are more familiar with those amendments than I. I work with them on a daily basis, but you are the ones who decided that they were necessary because of the *Wingo* decision.

But, again, I think it indicates the intent of Congress that the jurisdiction of the magistrate should be broad and flexible.

Now we are back for further amendments because again we have some problems as to what is intended.

We in Oregon probably use the magistrate system in a different way, or at least in a broader way than anyone else. As a result of that, I think that we have been able to achieve efficiencies. Last year we were able to try 81 cases per judge. The average district was able to try 47 cases per judge. That is to a great extent attributable to our magistrates. Out of the total cases tried by our court, our 21½ magistrates, through the consent of the parties, were able to try 61 cases.

I think that is what we are here about. I think that is absolutely necessary.

We are getting behind. We are not only going behind as far as everyday cases are concerned, but the percentage of older than 3-year cases has increased substantially. So I think that the amendment is a very, very desirable amendment. I can endorse it wholeheartedly from our practical experience. I think it is an absolute necessity. I think the citizens of our country are entitled to the highest quality of justice in the shortest period of time at the least expense to the litigants and the taxpayer. I think this is a new process, an innovative process, that is bringing this about. I don't think we are going to be able to stop here. I think there are other matters Congress is going to have to consider. I think that the things that we consider to be a necessity of the past may be the luxuries of the future because the volume of litigation constantly goes up.

About 60 percent of our court's cases come as a result of congressional acts that have been enacted since 1960. So any time there are

remedies which are afforded to the public generally, they have a right to assert those remedies by asserting those remedies to the court.

The judicial system has become more efficient to provide the litigant with a conclusion within a reasonable time period.

I think there are a couple of matters that I wanted to discuss a little bit, just sort of off the top of my head. I did make a comparison between the Senate version and the House version of the amendment. I really don't think any of them are too consequential or substantial, but I do have some thoughts on them, and perhaps it may open up the subject so we can discuss it a little bit.

First, with reference to the authorization, I think the House version provides that only the full-time magistrates would be allowed to exercise civil trial jurisdiction.

We have a part-time magistrate and part-time bankruptcy judge. The House version, of course, would eliminate that magistrate from trying civil cases. I certainly agree, you should watch conflicts of interest, and I do feel that magistrates—part-time magistrates—should not be trying cases if they are practicing law besides being a magistrate.

However, I see no reason why it would not be advisable to have part-time magistrates trying cases if they are not involved in the practice of law. That was the one thing.

The second thing was the blind consent provision. I term it "blind consent" because the House version specifically provides that it is the clerk of the court who is to make inquiry of the attorneys to whether or not a particular matter can be tried before a magistrate. The court is not to be aware of the response of a particular attorney as far as indicating a willingness to try the matter before the magistrate.

The Senate version merely provides that there should be no coercion in obtaining the consent of the parties.

I again look to our own district. When I testified here previously there was some inquiry about the coercion problem, and I didn't really appreciate that that might be a problem. As a result of that inquiry we now have the clerk, at the time that the complaint is filed, deliver to counsel for the plaintiff a schedule of discovery and also an indication as to whether or not the case can or cannot be tried before a magistrate.

At the time that the matters are delivered to the marshal for service, that same information is conveyed to defense counsel. So we do start out in that light. However, we have found from our own experience that it's probably premature at that state for either an attorney or litigant to make that determination.

So, at the initial conference before the magistrates, the magistrates ask whether or not it is a case that can or cannot be tried before a magistrate.

So you see, if you limit it to the clerk's inquiry alone, I think you are creating some problems that you do not intend to create.

We do not as judges make any inquiry. However, I can see in some situation where it may be necessary.

We presently work on a modified individual master calendar. It would be impossible for the clerk and the Chief Judge of our district to determine what the calendar is going to be if the clerk is sworn to secrecy as to whether or not the case can or cannot be tried before a magistrate.

With respect to the selection provision, I know that the House provides specifically that there be a minimum 5 years bar membership requirement.

I really don't have any fault to find with that. I think that experience is an essential, and I think there should be a requirement as far as bar membership and experience are concerned.

I do have a question as to whether those particular qualifications should be set out in the statute. I do know, having been a member of the Magistrate Committee, that there have been adopted guidelines for the selection of magistrates which have been approved by the Judicial Conference of the United States. I think actually they take care of the requirements contained in this bill.

We have had some experience there. I think the reason I have a little hesitancy about putting it into the statute is that we just recently went through a reappointment of one of our existing magistrates. We did follow a combination of the requirements set out in the former House bill and the guidelines established by the Judicial Conference. It worked very well for us. There was no problem. We only have three judges on our board, and we did not have any difficulty in selecting the members of the nominating commission.

However, it wasn't too long after that that Judge Metzner called me from the southern district of New York. They have 27 judges, and it does create a problem for them. I think if anyone is experienced with judges, they will realize how independent they become. It is very difficult to get 27 judges to agree on who the membership of the nominating commission is going to be, let alone who the new magistrate is going to be. So I do feel that flexibility is required as far as that process is concerned. I would hate to have ourselves tied to a specific process contained in the statute and then have to come back in a short period of time and say, "Well, we feel that this is not workable for us." So I do favor the delegation of that responsibility to the Judicial Conference.

I think the Judicial Conference has attempted to assume that responsibility in adopting guidelines for selection of magistrates. I think they meet all of the requirements which are set forth in the House version of the amendment, or perhaps a little more strict than that.

I did find about nine differences between the House and Senate versions. There are only about five differences that bother me. The others have to do with the juvenile delinquency law and the misdemeanor-type cases.

The Senate bill does give the magistrates authority to handle those matters. I think it's a desirable thing. In effect, misdemeanor-type cases follow the same procedure, whether they are juvenile or otherwise.

I think that pretty well concludes the reports that I have. I think many of the matters are in the statement. I hesitated to take up the time of the subcommittee by reading the statement. I would welcome—not only welcome but would solicit—any questions you may have because I am very interested in this legislation. I think it's a very important bit of legislation. I think that the citizens of our country are entitled to have an efficient judicial process, and I think this is one step in that direction.

Mr. KASTENMEIER. Thank you, Judge Skopil, for your informative analysis, particularly of the two magistrates' bills. That has been very helpful. Are you aware of any particular, any serious, constitutional objection to either bill? We did have a minority report filed which in a sentence suggested that the Constitution forbids the delegation of

article III judicial power to persons who are not life tenured judges of article III created courts. The minority report's conclusion was that this bill, which has magistrates exercising certain powers, is therefore unconstitutional.

Judge SKOPIL. I know that has been a concern. I think that same question was at least discussed at the last hearing. I think since this time or maybe even prior to that time the Justice Department has done a great deal of research and has presented a very worthwhile paper in that regard. See Appendix. The constitutionality has never bothered me. I think the case decisions, at least up until now, would indicate that it has not been that great a concern to the courts. I think they are concerned about the statutory authority given to the magistrates, but I don't think I have seen any cases where they said this was an unconstitutional delegation of judicial power. If we had done that, we did that long ago because as I recall back in 1894 we established the U.S. Commissioner for Yellowstone Park to try petty offenses. So that has not given me any concern.

I think the *DeCosta* case, which was the first circuit case, indicated there was no problem constitutionally. I think they did question the authority of an appeal to be based upon a final order signed by a magistrate. Your amendments will clarify that very thing, and I think that is one reason why we are so interested in it. If we do have a constitutional problem—and I guess I can't see it—we every day inform defendants in criminal cases of their constitutional rights. They have a right to waive them. And I can really see no constitutional problem. I realize that is a question that has been raised. I think there is a recent case out of the first circuit which perhaps may have given us some concern, but I don't believe that case actually involves a constitutional question. It appears again to me that that case is determined upon the fact that the appeal was based upon a final order entered by a magistrate rather than a district judge. So that does not give me all that much concern.

Mr. KASTENMEIER. I would like to yield first to the gentleman from Michigan.

Mr. SAWYER. I have nothing, thank you.

Mr. KASTENMEIER. And I yield to the gentleman from California.

Mr. MATSUI. No questions.

Mr. KASTENMEIER. If not, I wish to—

Mr. SAWYER. May I address a question to Judge Hunter?

Mr. KASTENMEIER. You certainly may.

Mr. SAWYER. I recognize the validity of some of the responses. I think there is some validity to the point of my concern about this abolition of diversity and my concern does not stem from the historical basis of one State resident vis-a-vis another State. It's more a very small county situation vis-a-vis somebody from either another State or another area, or maybe even somebody in the county. What would be the practicality of the availability of filing a petition in the Federal court, as you might in a State court, alleging bias, where you can't get a fair trial. You are giving the Federal judge the right to decide whether justice would require, regardless of diversity, removal of the case to the Federal court. I was thinking of this after I listened to some of your answers. Is there any practicality to that or are there insurmountable problems?

Judge HUNTER. I appreciate the problems you have expressed because admittedly there are these little pockets around the United States

where there is some kind of prejudice, not prejudice based on the differences of State citizenship, and, obviously, each of those is somewhat of an ad hoc situation, each has to be examined on its own peculiar facts because they are local problems, and as I said earlier, I don't think those little pockets should control the much larger question of where litigation should be placed nationwide and I don't want to in answer to your question say anything that makes you think I am speaking for the Judicial Conference on this subject, but on a personal basis I am afraid that you have come to the bottom line, that it would be difficult to get a rule that would apply nationwide to solve the problems of these little pockets around the Nation where prejudice exists for the simple reason that this would put the Federal courts back into the business of having to hear those motions and to determine whether there was some sort of discrimination existing or some form of prejudice existing in order to determine whether that particular Federal court had jurisdiction of that particular matter and I fear that this would cause far more problems than it would cure; it would take an inordinate amount of time to do it that way.

I think the answer has to be that you have to do it on an ad hoc basis locally—you have to clear up your own problems, locally, with a local answer. That is my offhand reaction, and if I can take advantage of this situation to bring in another answer, I notice that this past year, the increase in Federal civil filings was a 6.8 increase over the year before, and I think if you look at your statistics that has been somewhere in the ballpark of the increase each year, so if we don't get Federal judges and get our backlogs knocked down to zero, $3\frac{1}{2}$ years, you will multiply out $3\frac{1}{2}$ by 6.8, and you will see that it exceeds 24 percent, in other words by $3\frac{1}{2}$ years from now the increase in the Federal caseload will exceed the number of cases that would leave the system of diversity jurisdiction is totally abolished.

But back to your other question, no, sir, I just think it's a local problem, and that means local remedies and I don't think you can solve the problem by broad national Federal rule.

Mr. SAWYER. Thank you.

Mr. KASTENMEIER. I have just one other question for both of you in terms of the legislation that you have endorsed today. Notwithstanding the fact that you both continue to base part of your argument on the court congestion theory, if that were not a factor at all, would not each of these pieces of legislation nonetheless be desirable for other reasons—for the purpose of flexibility in the Federal system as concerns magistrates and for a number of other reasons as concerns abolition of diversity jurisdiction. Let's assume for purposes of argument that we have all the Federal judges in the world to handle existing caseloads.

Judge SKOPIL. Responding as far as magistrates' amendments are concerned, I think the initial judgment that we have all the Federal judges we need, is a mistake. And I realize that is not the point you are making. We have been operating with a five-judge—we are going behind even in this stage. I believe regardless of whether you are going to have 117 more district judges, 35 more circuit judges, I think we are obligated, and I think particularly we or members of the legal profession, whether it be you as an attorney and part of the legislative branch or myself as an attorney and having the responsibilities of the judge, or the legal profession generally, I think the citizens of our

country have entrusted their legal system to us; I think we have a responsibility in terms of seeing that they receive consideration of their matters promptly, that disposition be made promptly. I think the Magistrates Act and the amendments to it are an absolute necessity, not only that the system requires it but it further demands it.

[Judge Hunter did not understand that this question was directed at both witnesses, and later submitted the following written response.]

Mr. Chairman, assuming with difficulty the nearly incredible hypothetical that there is no case load congestion in the Federal courts, nor any need for additional judges in the foreseeable future to keep the Federal dockets current, there are still several fundamental reasons why diversity jurisdiction should be abolished. I will quickly mention three of them.

First, is the need to honor the concept of federalism which is premised on the State courts being allowed to do those things which are State matters involving purely State law and to leave it to the Federal courts to handle Federal matters. To do otherwise in modern times results in a needless and unjustifiable interference with the sovereignty concept of our States. The only premise for such interference is that the State tribunals cannot be trusted to render justice in situations where by happenchance either the plaintiff or the defendant is from a different State, and the amount claimed exceeds \$10,000. In effect, those advocating that diversity continue to be a basis for Federal jurisdiction are saying, "You, Mr. State Court, are not established on a sufficiently good footing with a sufficient ethical basis to adjudicate justly State litigation that arises between citizens of different States including artificial citizens, even though you are the only resort to a much larger volume of the very same kind of litigation where diversity is nonexistent or not claimed."

Second, by continuing diversity jurisdiction you are providing a realistic disenchantment to the States to reform purely local problems, including diversity, if indeed any local problems are based on diversity situations. By permitting resort to the Federal courts to avoid local problems, you are permitting the local problem to be swept under the rug and thereby making it unnecessary for the local bar and public to address the problem and solve it. This prolongs the existence of the local problem that should and can be quickly cured by appropriate local action, and results in a continued and unnecessary debasement of the State court system.

Third, to continue diversity jurisdiction forces Federal judges in a wasteful manner to "guess" and to "speculate" as to what the State law is or may be, resulting in Federal judges guessing wrong and further resulting in public confusion as to what the State law is. The exercise of diversity jurisdiction defers an authoritative decision by a state court as to what the applicable state law is until the state court at some unknown later time has the opportunity to decide the question. This deters the natural development of state law and results in confusion in the marketplace. It is counterproductive to the improvement of our state court systems.

Mr. Chairman, I simply state these three reasons with the note that other sound reasons for abolition of diversity are contained elsewhere in this testimony and that of others who have appeared before you.

Mr. KASTENMEIER. Thank you. Well, in any event, on behalf of the committee we thank you both for your appearance this morning. Time is drawing late, but I do want to call the next witnesses up and we note their patience. Our next panel of witnesses represents the American Bar Association. We are honored this morning to have the presence of John C. Shepherd, chairman of the association's house of delegates, and a practicing lawyer from Missouri. With Mr. Shepherd is Edward W. Mullinix, a member of the council of the litigation section and a practicing lawyer from Philadelphia. They will both testify on diversity jurisdiction; also on the panel with them is Magistrate Lawrence S. Margolis who testified before us during the 95th Congress. He is the immediate past chairman of the ABA National Conference of Special Court Judges, and is now vice chairman of the Judicial Administration Division of the ABA. In addition to all this, Mr. Margolis is a magistrate in the District Court for the District of Columbia. I cordially welcome all three.

Mr. Mullinix, would you like to proceed?

TESTIMONY OF EDWARD W. MULLINIX, AND JOHN C. SHEPHERD FOR THE AMERICAN BAR ASSOCIATION

Mr. MULLINIX. Mr. Chairman, Congressman Sawyer, I am Edward Mullinix of Philadelphia and a member of the council of the section of litigation of the American Bar Association. With me is John C. Shepherd of St. Louis, chairman of the House of Delegates of the association. We have each been practicing law, specializing in litigation, for about 30 years.

By designation of the president of the ABA, we appear before you to express the opposition of the association to the enactment of H.R. 2202 or any other legislation that would abolish or curtail the diversity jurisdiction of the Federal courts.

We believe that diversity jurisdiction has served the ends of justice well, it has done so for nearly 200 years and the Congress should not alter that jurisdiction in the absence of a compelling showing of need for change. We do not believe the proponents of change have made a sufficient showing.

The proponents argue that the Federal courts are overburdened and that abolishing diversity jurisdiction would, of course, reduce their caseloads. We do not believe that the cure for any overburdened justice system is to limit the public's access to the system by reducing the scope of its jurisdiction when that jurisdiction is serving a useful purpose in our society. The most obvious solution I suggest is to increase the capacity of the system, as the 95th Congress did, with our support, in authorizing additional court of appeals and district court judgeships. Another possibility is to improve the efficiency of the system. An effort in this direction is the current experimentation with compulsory arbitration for certain kinds of cases in the Federal district courts. Another is the magistrates legislation, also before this subcommittee, which we support and which would have been enacted in the 95th Congress if the House of Representatives has not attempted to tie it together with abolition of diversity jurisdiction.

We believe that the argument that diversity cases should be shifted from the Federal courts, which are overburdened, to the State courts, which can easily absorb them because of the State systems' collective larger capacity, is an inaccurate oversimplification. Some Federal district courts are not overburdened at all. Some State courts are so overburdened that it takes years to get a case to trial.

We do not accept the contention that diversity jurisdiction has outlived its usefulness because there is no longer any significant prejudice in State courts against out-of-State litigants. There is local prejudice. Nearly every lawyer who has significant trial experience has encountered local prejudice, not just in State courts but sometimes in Federal courts as well. I suggest that there is no way to stamp out prejudice, but the availability of the Federal forum for some cases gives litigants a choice that can sometimes be used to avoid or minimize prejudice in those cases where it is most likely to occur.

Some people have advocated curtailing diversity jurisdiction by legislation that would deny a plaintiff access to any Federal district court in the State of which he is a citizen. They argue that a plaintiff suing in his own State cannot be said to need a Federal court for the purpose of avoiding local prejudice, so there is no reason for diversity

jurisdiction in that situation. But the avoidance-of-prejudice factor is by no means the only justification for diversity jurisdiction, as we shall discuss in a few minutes. Furthermore, this kind of change would have some highly undesirable consequences.

Its practical effect would be to deprive the injured individual who has a claim against a national corporation, incorporated and having its principal place of business in another State, of access to the Federal court in his home State even though he may prefer that court because he can get his case to trial there in 6 months or a year rather than the 5 years it will take in his State court. His alternative, if he can afford it, would be to start his suit in a Federal court in another State. Some litigants would be able to do that. In those cases the only accomplishment will have been to increase the cost of litigation. That is something we deplore. Therefore, Mr. Chairman, the American Bar Association opposes the enactment of any legislation that would eliminate the right of a resident plaintiff to bring a diversity action.

Next, we do not agree with the contention that State courts, rather than Federal, should be deciding questions of State law. The plausibility of that contention, I submit, is only superficial. There are actually many benefits inherent in our present system of Federal courts as working partners with the State courts in the enforcement of rights arising under State law, just as the State courts are working partners with the Federal courts in the enforcement of many rights arising under Federal law. The coordinate jurisdictions of the State and Federal courts have permitted the migration of ideas between the two systems. Each has learned from the other.

This interaction has contributed materially to constant improvement in civil and criminal procedural rules, rules of evidence, and court administration techniques. We would inevitably impede this useful process if we were to isolate the Federal courts from the State courts in terms of the kinds of cases each can hear. Without diversity cases, many lawyers who now practice in both Federal and State courts would have much less occasion to be in both, and the flow of ideas in each direction would materially diminish.

I have to disagree with Judge Hunter's view because I feel there would also be a reduction in the relative numbers of lawyers practicing in the Federal courts. If Federal courts were limited to cases arising under Federal laws, the lawyers trying cases in the Federal courts would tend to be limited to specialists—in such fields as antitrust, securities, and Federal employers' liability. We would no longer have lawyers trying negligence and commercial cases in both State and Federal courts, and to that extent we would reduce the number of lawyers familiar with practice in any particular Federal court. This, I submit, would have the undesirable consequences of limiting the public's choice of lawyers and increasing the cost of legal service to the public.

There is another serious disadvantage that would result from either abolishing or curtailing diversity jurisdiction. We would lose the machinery now available, under section 1407 of the Judicial Code, for pre-trial consolidation in one district of multidistrict litigation involving such things as mass-disaster—airline crashes and the like—when diversity is the only basis for Federal jurisdiction.

The legal profession is almost unanimous in opposing the abolition of diversity jurisdiction. Last year the American Bar Association solicited the views of State bar associations on this issue; 31 State bar associations responded. One took no position; 30 opposed abolition. Of the 30, 1 supported curtailment.

Opposition is not limited to the organized bar. I was talking just yesterday with a Federal district judge in Philadelphia who said that I could repeat to this subcommittee his statement to me, which was to the effect that the elimination of the diversity jurisdiction of Federal district courts would be a disaster. There are other Federal district judges of the same view. I was told not long ago by a district judge in Maryland that the district judges in the fourth circuit are about evenly divided on the issue, so there is a substantial group of Federal judges who, with all due respect to Judge Hunter's opinion, disagree with it.

Turning to the academic world, Professor Moore, the dean of authorities in the United States on Federal courts, procedure and jurisdiction, has long opposed suggestions for the abolition of diversity jurisdiction. He has written on the subject in his widely respected treatise:

The Constitution envisages a working partnership between the State and Federal courts under which each forum may enforce the law of the other sovereign whenever it is deemed appropriate. * * * The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants.

Another great academic authority is from Congressman Sawyer's State, a member of the faculty of the Michigan Law School, John Reed, who serves with Mr. Shepherd and me on the council of the section of litigation of the American Bar Association, fully supports our views and as a matter of fact was good enough to review the statement that we are submitting this morning. He gave it his approval.

Mr. KASTENMEIER. Who is that?

Mr. MULLINIX. Prof. John Reed of the University of Michigan Law School, who is one of the country's outstanding authorities in the practice and procedure field.

In conclusion, let me say that the present system of coordinate Federal and State jurisdictions has been an important part of our federalism that we should not lightly abandon. No one has yet come forward even to assert, much less demonstrate, that diversity jurisdiction, which had its genesis in the Constitution and has been with us since the first Judiciary Act in 1789, has ever resulted in any injustice to any litigant. For the reasons we have discussed, we are concerned that abolishing that jurisdiction would have a serious adverse effect on the administration of justice in the United States.

Mr. Chairman, this completes our formal statement. Mr. Shepherd and I will be pleased to respond to any questions you may have.

[The statement of Edward W. Mullinix and John C. Shepherd follows:]

STATEMENT OF EDWARD W. MULLINIX AND JOHN C. SHEPHERD FOR AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the subcommittee. I am Edward W. Mullinix of Philadelphia, and a member of the Council of the Litigation Section of the

American Bar Association. With me is John C. Shepherd of St. Louis, Chairman of the Association's House of Delegates. Each of us has been practicing law, specializing in litigation for about 30 years.

By designation of the President of the ABA, we appear before you to voice the opposition of the Association to the enactment of H.R. 2202 or any other legislation which would abolish the diversity jurisdiction of the federal courts.

Diversity jurisdiction has served the ends of justice well for nearly 200 years and the Congress should not alter that jurisdiction in the absence of a compelling showing of need for change. We do not believe the proponents of change have made a sufficient showing.

The proponents argue that the federal courts are overburdened and that abolishing diversity jurisdiction would, of course, reduce their caseloads. We do not believe that the cure for any overburdened justice system is to limit the public's access to the system by reducing the scope of its jurisdiction when that jurisdiction is serving a useful purpose in our society. The most obvious solution is to increase the capacity of the system as the 95th Congress did, with our support, in authorizing additional court of appeals and district court judgeships (Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629). Another possibility is to improve the efficiency of the system. An effort in this direction is the current experimentation with compulsory arbitration for certain kinds of cases in the federal district courts. Another is the magistrates legislation, which we support and which would have been enacted in the 95th Congress (S. 1613) if the House of Representatives had not attempted to tie it together with abolition of diversity jurisdiction.

The argument that diversity cases should be shifted from the federal courts which are overburdened, to state courts which can easily absorb them because of the state systems' collective larger capacity, is an inaccurate over-simplification. Some federal district courts are not overburdened at all. Some state courts are so overburdened that it takes years to get a case to trial.

We do not accept the contention that diversity jurisdiction has outlived its usefulness because there is no longer any significant prejudice in state courts against out-of-state litigants. There is local prejudice. Nearly every lawyer who has significant trial experience has encountered local prejudice, not just in state courts but sometimes in federal courts as well. There is no way to stamp out prejudice, but the availability of the federal forum for some cases gives litigants a choice that can sometimes be used to avoid or minimize prejudice in those cases where it is most likely to occur.

Some people have advocated curtailing diversity jurisdiction by legislation that would deny a plaintiff access to any federal district court in the state of which he is a citizen. They argue that a plaintiff suing in his own state cannot be said to need a federal court for the purpose of avoiding local prejudice, so there is no reason for diversity jurisdiction. But the avoidance-of-prejudice factor is by no means the only justification for diversity jurisdiction, as we shall discuss in a few minutes. Furthermore, this kind of change would have some highly undesirable consequences. Its practical effect would be to deprive the injured individual who has a claim against a national corporation (incorporated and having its principal place of business in another state) of access to the federal court in his home state even though he may prefer that court because he can get his case to trial there in six months or a year rather than the five years it will take in his state court. His alternative, if he can afford it, would be to start his suit in a federal court in another state. Some litigants would be able to do that. In those cases the only accomplishment will have been to increase the cost of litigation. That is something we deplore. Therefore, the American Bar Association opposes the enactment of any legislation that would eliminate the right of a resident plaintiff to bring a diversity action.

We do not agree with the contention that state courts, rather than federal, should be deciding questions of state law. The plausibility of that contention is only superficial. There are actually many benefits inherent in our present system of federal courts as working partners with the state courts in the enforcement of rights arising under state law just as the state courts are working partners with the federal courts in the enforcement of many rights arising under federal law. The coordinate jurisdictions of the state and federal courts have permitted the migration of ideas between the two systems. Each has learned from the other. This interaction has contributed materially to constant improvement in civil and criminal procedural rules, rules of evidence and court-administration techniques. We would inevitably impede this useful process if we isolate the federal courts from the state courts in terms of the kinds of cases each can hear. Without diversity cases many lawyers who now practice in both federal and state

courts would have much less occasion to be in both, and the flow of ideas in each direction would materially diminish.

There would also be a reduction in the relative number of lawyers practicing in the federal courts. If federal courts were limited to cases arising under federal laws, the lawyers trying cases in the federal courts would tend to be limited to specialists—in such fields as antitrust, securities, and federal employers' liability. We would no longer have lawyers trying negligence and commercial cases in both state and federal courts, and to that extent we would reduce the number of lawyers familiar with practice in any particular federal court. This would have the undesirable consequences of limiting the public's choice of lawyers and increasing the cost of legal service to the public.

There is another serious disadvantage that would result from either abolishing or curtailing diversity jurisdiction. We would lose the machinery now available, under section 1407 of the Judicial Code (28 USC Sec. 1407), for pretrial consolidation in one district court of multidistrict litigation involving mass disasters, such as airline crashes, when diversity is the only basis for federal jurisdiction.

The legal profession is almost unanimous in opposing the abolition of diversity jurisdiction. Last year the American Bar Association solicited the views of state bar associations on this issue. Thirty-one responded. One took no position. Thirty opposed abolition. One of the 30 supported curtailment.

Opposition is not limited to the organized bar. Professor James William Moore, the dean of authorities in the United States on federal courts, procedure and jurisdiction, has long opposed suggestions for the abolition of diversity jurisdiction. He has written on the subject in his widely respected treatise (1 J. Moore, *Federal Practice* Para. 0.71 (3.—27) (rev. ed. 1964)):

"The Constitution envisages a working partnership between the state and federal courts under which each forum may enforce the law of the other sovereign whenever it is deemed appropriate. . . . The whittling away or surrender of diversity jurisdiction, or of any other part of the federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants."

The present system of coordinate federal and state jurisdictions has been an important part of our federalism that we should not lightly abandon. No one has yet come forward even to assert, much less demonstrate, that diversity jurisdiction, which had its genesis in the Constitution and has been with us since the first Judiciary Act in 1789 (1 Stat. 73), has ever resulted in any injustice to any litigant. For the reasons we have discussed, we are concerned that abolishing that jurisdiction would have a serious, adverse effect on the administration of justice in the United States.

This completes our formal statement. Mr. Shepherd and I will be pleased to respond to any questions you may have.

Mr. KASTENMEIER. Mr. Shepherd, do you have any statement to add?

Mr. SHEPHERD. I would like to supplement that if I may, Mr. Chairman. First, and aware of the time that we have here, let me take just a minute to tell you how pleased I am to be here. I am a trial lawyer, and this is my first occasion to ever be in Washington on such an important issue, and I appreciate the time that you are giving me.

I would like to supplement just briefly what Mr. Mullinix has said with reference to some of the judges' feelings. I talked with Judge Donald Lay yesterday, who is soon to be the next chief judge of the eighth circuit, which covers both Judge Hunter's jurisdiction as a district judge and mine as a practicing lawyer in Missouri. And here is what Judge Lay had to say in response to the position taken by the Judicial Conference:

There are many reasons why I do not share the enthusiasm of my judicial brethren for this measure. First, I do not believe the State systems can effectively absorb this increased workload: as a result, the delay in processing a case that a citizen now experiences will increase manifold.

Second, the lawyer will find that the logistical problems of trying complex and sophisticated civil cases will multiply; county courthouses hundreds of miles removed from air terminals will not provide the most facile forum.

Third, the difficulty of selecting a fair jury for an out-of-State citizen in rural communities will present an intangible but real burden on the ability to achieve justice.

Fourth, in many cases the cost of litigation will increase; in most rural or out-of-State areas where trials will be held, it will be incumbent to hire local lawyers to assist in processing the case with the local court, and few of these lawyers will possess the sophisticated trial experience now available in the metropolitan bar.

Fifth, notwithstanding the fact that a Federal court must apply State common law as would the highest court of the State, Federal district court and appellate decisions have long provided a substantial contribution in analytical decisions to State common law.

Lastly, a personal note of disappointment. I am confident that the quality of advocacy in the Federal courts will see a marked decrease due to the absence of the highly trained and experienced trial bar, who often specialize in civil cases.

That is the end of that quote. That appeared in a journal entitled the International Society of Barristers Quarterly volume No. 2, under the date of April 1978.

I called Judge Lay to be certain that his position had not changed in the interim. He told me that, if anything, his position had become even more sincere, and he urged me to express this attitude to the subcommittee.

Now, to many trial lawyers it strikes us as being unusual that the Congress at this critical time in history would be saying to the manufacturers of this country that the Federal courts in diversity cases shall be closed to you but remain open to your foreign competitors under alienage jurisdiction. It strikes us as being quite unusual that, at this time in history, the Congress of the United States shall say that the Federal courts shall be closed to the working man in his own State, and open only to those cases that do not involve tort damages or personal injury, and that they will be closed to the citizens of this country who become injured. We say that the trial lawyers of this country have—by the very figures that Judge Hunter mentioned—proved that prejudice does still exist: 30,000 times within the last year, according to these figures, experienced people felt that their rights could be best served in the U.S. district courts. So we suggest to you that the burden of proof rests heavily upon those who want the Congress to deprive our citizens of the use of the Federal courts and that they have not sustained that burden of proof.

Now, it's a difficult spot for any lawyer to be in, where the President of the United States as recently as yesterday said this would be an improvement in the administration of justice. The Chief Justice of the United States has said he wants to abolish diversity jurisdiction. The Attorney General, a former judge himself, says he wants to abolish diversity jurisdiction.

We say that they're wrong. We say that the people of this country have—by their filings and by using these courts—demonstrated that these people in high office are mistaken. And we believe that it's the Congress of the United States that will express that view of the people.

Now, of course, one might say, well, it's only human that judges having received an increase in compensation so recently, which the ABA strongly supported, and having received additional help in handling the cases, the only thing left, I guess, would be to also say we want to cut our workload. We suggest that the time is not ripe

for abolishing diversity jurisdictions, that the case has not been sustained, and that Congress would be making a serious mistake—not just for lawyers but a serious public mistake—to take the Federal courts away from the people under these circumstances.

Mr. KASTENMEIER. Mr. Shepherd, if I understand your argument, it's that diversity alone should not be in excess for jurisdiction in the Federal courts, that the working man should have free access of Federal courts for all questions. Why do you make the distinction?

Mr. SHEPHERD. I believe the thing we are addressing here this morning is the question of our existing diversity jurisdiction, not whether there should be broader use of the Federal courts. The Congress has already expressed itself considerably on that. Many of the acts that have been passed in recent years have provided a new and exclusive remedy in the Federal courts. But with reference to diversity, we believe it is a very important element in every citizen's right that, under the circumstances which have been outlined for diversity jurisdiction, the plaintiff may choose to go to the Federal court or the defendant may choose to remove the case to the Federal court.

Now, the suggestion that has been made here this morning is that if this resolution becomes law the Federal employers' liability cases will be tried in the Federal courts—and I assume you would include in that the seamen's cases—moving those over into Federal courts would represent quite a change in the law. In many areas of this country—and certainly out in the Midwest where I am from—the railroad workers file their suits in the State courts even though it's the Federal Employers' Liability Act. The seamen file their injury cases in the State court. The statute makes those cases nonremovable, but I gather from what we are saying here that Congress has some thoughts about making railroad workers' cases go entirely in Federal court. I don't believe the representatives of the unions of either the railroads or the seamen have been confronted with that suggestion. I am just not aware of that having been discussed with them.

Mr. KASTENMEIER. Mr. Margolis, do you want to give your statement?

TESTIMONY OF LAWRENCE S. MARGOLIS, MAGISTRATE, DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Mr. MARGOLIS. Mr. Chairman and members of the subcommittee. I am Lawrence S. Margolis. I would like to integrate my prepared statement into the record.

Mr. KASTENMEIER. Without objection, your statement will be received in the record.

[The statement of Lawrence S. Margolis follows:]

STATEMENT OF MAGISTRATE LAWRENCE S. MARGOLIS FOR AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: I am Lawrence S. Margolis and appear before you on behalf of the American Bar Association by designation of its President, S. Shepherd Tate.

It is an honor and a pleasure to speak to this Committee again on the "Magistrate Act of 1979," H.R. 1046. I had the privilege of testifying with former Senator Joseph D. Tydings on September 27, 1977, when he appeared on behalf of the American Bar Association in support of this legislation.

I am the Vice-Chairman of the American Bar Association Judicial Administration Division and am the immediate past Chairman of the American Bar

Association National Conference of Special Court Judges. I have been a United States Magistrate for the District of Columbia since January 1971 and, this past month, was reappointed to a second eight-year term.

With the Subcommittee Chairman's consent, I would like to incorporate by reference my September 27, 1977 testimony and that of former Senator Tydings into the record of this hearing. That testimony appears on pages 85 through 127 of the Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 95th Congress, First Session, September 27, 1977.

At the annual meeting of the American Bar Association in August 1977, the House of Delegates approved the following resolution:

"That the American Bar Association recommends enactment of legislation such as S. 1613, 95th Congress, the proposed 'Magistrate Act of 1977,' as that bill was approved by the U.S. Senate on July 22, 1977."

Presently, U.S. Magistrate misdemeanor jurisdiction is limited to non-jury trials with possible penalties of up to one year in prison or up to a \$1,000 fine, or both. Consent of the defendant to magistrate jurisdiction is currently required in any misdemeanor case. H.R. 1046 would remove the fine limitation and permit the U.S. Magistrate to try misdemeanor jury trials. Thus, U.S. Magistrates would be able to try thousands of additional misdemeanor cases permitting the District Court Judges to turn their attention to more serious felony cases and comply with the Speedy Trial Act.

Civilly, the bill would permit U.S. Magistrates, with the consent of the parties, to try any jury or non-jury case regardless of the issue or amount of money or property involved. This provision will give greater access to the courts, to the poor, to the disadvantaged, and to persons whose cases involve relatively small amounts of money and property, which are presently caught in the large backlog of pending civil cases. The bill provides that no District Court Judge shall attempt to persuade or induce any party to consent to civil trial by a magistrate.

A vital part of the bill concerns appeals from the judgment of the U.S. Magistrate. The appeal may be taken to a District Judge, and then to the U.S. Court of Appeals. However, the parties may stipulate that an appeal from the judgment of the U.S. Magistrate may be taken directly to the Court of Appeals. The latter provision eliminates the extra tier of review. Without the option of such a direct appeal to the Court of Appeals, many attorneys will not consent to a magistrate trial.

The bill also upgrades the quality and selection standards for appointment of U.S. Magistrates and provides for Magistrate Selection Panels to make recommendations to the District Court Judges, who make the appointment of U.S. Magistrates in their judicial districts.

Nearly all witnesses who have previously testified with regard to the constitutionality of this bill are agreed that it is constitutional. That view has been voiced by, among others, Attorney General Griffin B. Bell.

This bill will provide flexibility to the Federal courts to meet changes in docket pressures brought on by fluctuations in civil and criminal caseloads throughout the various judicial districts.

Hearings of this Subcommittee have highlighted the need to take some bold steps to streamline the administration of justice in the Federal courts. This legislation, originally drafted by the Department of Justice, and supported by nearly all organizations and persons who have previously testified, is a good step in that direction. The American Bar Association strongly recommends the prompt passage of this bill.

Mr. MARGOLIS. Mr. Chairman and members of the subcommittee, I am Lawrence S. Margolis and appear before you on behalf of the American Bar Association by designation of its president, S. Shepherd Tate.

It is an honor and a pleasure to speak to this committee again on the Magistrate Act of 1979, H.R. 1046. I had the privilege of testifying with former Senator Joseph D. Tydings on September 27, 1977, when he appeared on behalf of the American Bar Association in support of this legislation.

I am the vice chairman of the American Bar Association Judicial Administration Division and am the immediate past chairman of the

American Bar Association National Conference of Special Court Judges. I have been a U.S. magistrate for the District of Columbia since January 1971 and, this past month, was reappointed to a second 8-year term.

With the subcommittee chairman's consent. I would like to incorporate by reference my September 27, 1977 testimony and that of former Senator Tydings into the record of this hearing. That testimony appears on pages 85 through 127 of the Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 95th Congress, First Session, September 27, 1977.

At the annual meeting of the American Bar Association in August 1977, the house of delegates approved in principle the bill now before you.

H.R. 1046 would remove the fine limitation in misdemeanor cases and would allow the magistrate to try misdemeanor jury trials.

Civilly, the bill would permit U.S. magistrates, with the consent of the parties, to try any jury or nonjury case regardless of the issue or amount of money or property involved.

A vital part of the bill concerns appeals from the judgment of the U.S. magistrate. The appeal may be taken to a district judge, and then to the appropriate U.S. court of appeals. However, the parties may stipulate that an appeal from the judgment of the U.S. magistrate may be taken directly to the appropriate court of appeals. The latter provision eliminates the extra tier of review. Without the option of such a direct appeal to the court of appeals, many attorneys will not consent to a magistrate trial.

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Nearly all witnesses who have previously testified with regard to the constitutionality of this bill, are agreed that it is constitutional. That view has been voiced by, among others, Attorney General Griffin B. Bell.

This bill will provide flexibility to the Federal courts to meet changes in docket pressures brought on by fluctuations in civil and criminal caseloads throughout the various judicial districts.

In conclusion, Mr. Chairman, the American Bar Association strongly recommends the prompt passage of this bill.

I would be happy to answer any questions the chairman or the committee members may have.

Mr. KASTENMEIER. Thank you, Mr. Margolis. If there are no further questions, does anyone have any further thoughts on diversity. The gentleman from Michigan.

Mr. SAWYER. I am sympathetic. I also spent 30 years as a trial lawyer. I happen to know Judge Lay also, and, incidentally, he was a fine trial lawyer before he ascended the bench. I have to say that although my position in the last Congress, primarily because I was so devastated with the problem of overloading in the Federal courts, was for the abolition of diversity jurisdiction. Having fought this fight with the committee, I think, I tend to agree that the diversity jurisdiction has served its purpose, and that it seems to me with the

addition of somewhere from 135 to 155 new Federal judges, the implementation of the magistrate system, which I am supportive of, the improvement in the Bankruptcy Act, which should relieve the Federal court of some considerable work, that we ought to at least see what these improvements do for the load of the Federal courts before we start taking away such a long-established institution as diversity. So, I now have—because of the things that have happened—changed my views. And I appreciate listening to you.

Mr. SHEPHERD. Thank you.

Mr. KASTENMEIER. I am of course dismayed to learn my colleague has changed his views; I turn to the gentleman from California.

Mr. MATSUI. I think, if I were sitting at the chair where you are sitting, I also would probably take the very same posture you are, because I really feel seriously that the more forums you have the better off you are. My position is not locked in concrete, but I am inclined to support the bill that would eliminate diversity jurisdiction. At the same time I do—I think it was the gentleman on the far side over there made a rather interesting comment that I think is something I have to look into—and that is the fact that there may be an additional burden on the State courts initially and I certainly would want to look into that before formulating a final position. I would like to get some information from the staff on that. But my inclination is to support the bill.

Mr. KASTENMEIER. All right. The Chair would like to announce that our next witness originally scheduled to follow the American Bar Association witnesses will be postponed until another day. Since we have already reached the hour of 12:15, Mr. Daniel Meador will be asked to return at a future time to present his testimony on both magistrates and diversity. This will conclude the testimony this morning. We appreciate the appearance this morning of representatives of the American Bar Association and the Judicial Conference of the United States. So, until 9:30 tomorrow morning, the committee stands adjourned.

[Whereupon at 12:15 p.m., the hearing was adjourned.]

DIVERSITY OF CITIZENSHIP JURISDICTION/ MAGISTRATE REFORM—1979

THURSDAY, MARCH 1, 1979

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Gudger, Matsui, Railsback, Moorhead, and Sawyer.

Also present: Michael J. Remington, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order. We are continuing our hearings of two important bills which reform the Federal judicial system—H.R. 1046, Magistrates Reform, and H.R. 2202, Diversity of Citizenship Jurisdiction.

Our first witness this morning is our colleague, the Honorable Dan Glickman, Member of Congress from the State of Kansas, now in his second term.

We are very pleased to have Congressman Glickman here, and you may proceed as you wish.

TESTIMONY OF THE HONORABLE DAN GLICKMAN, REPRESENTATIVE IN CONGRESS OF THE UNITED STATES FROM THE FOURTH DISTRICT OF THE STATE OF KANSAS

Mr. GLICKMAN. Thank you, Mr. Chairman, for permitting me the opportunity to testify. I would ask unanimous consent my entire statement appear in the record, so I do not have to read it in its entirety.

Mr. KASTENMEIER. Without objection, it will be part of the record.
[The statement of Hon. Dan Glickman follows:]

STATEMENT BY REPRESENTATIVE DAN GLICKMAN (D.-KANS.)

Mr. Chairman and members of the subcommittee, I appreciate the fact that you arranged for me to have a few minutes this morning to have my say about your proposed legislation to abolish diversity of citizenship as a basis for jurisdiction of federal courts. As I am sure you all recall, I opposed legislation to achieve this end when it was considered on the floor a year ago yesterday. I still oppose this idea in principle and wanted to come to your subcommittee, as you are working on the legislation, to outline my concerns.

In reviewing the discussions in your subcommittee during the last Congress, there was a considerable amount of reference to the federal court jurisdiction

in cases based on diversity of citizenship as a "luxury." I hate to disagree with those who feel that way—I can assure you I respect the work of this subcommittee; however, in this instance, I must. Admittedly, Article III, Section 2 of the Constitution gives the authority to the federal judiciary to cases "between Citizens of different States" without mandating that such authority must be implemented. But I doubt that any of you would argue with my view that when the Constitution was drafted it was carefully refined; it seldom, if ever, included "luxuries."

I have seen arguments that conditions have changed sufficiently in this country that the need for preserving federal jurisdiction in cases based on diversity no longer exists. My feeling has been that reasons do still exist for providing the option of federal court jurisdiction in these cases. And that view was shared by a large number of Kansas attorneys who contacted me on this question last year. One attorney summed it up quite well:

"One of the original reasons for creating federal courts was to give out-of-state parties an impartial forum in which to proceed. My experience with some state courts, both in this state and others, leads me to believe that the prior justification is still sound."

Others noted particular concerns which have developed as a result of growth of corporate cases, for example involving product liability. According to one attorney experienced in handling cases for a large Wichita-based firm, "There are a number of these jurisdictions in which, in my opinion, which is shared by other experienced trial lawyers, a defendant-manufacturer simply cannot get a fair trial."

Statements like those and the fact that we are living in an increasingly mobile society and an increasingly complex one, convince me that there is today as much reason to preserve this basis for federal court jurisdiction as when the Congress decided, nearly two hundred years ago, to provide the authority available under Article III.

A related point was raised by another Congressional office last year in a call to my office which was reiterated in letters from attorneys in my State. That is that in many states, state trial court judges are elected officials. As all of us, ourselves elected officials, realize, elected we have a tendency to look out for the interests of their constituencies. And I must say that I agree with the view expressed in one of the letters I received on this matter that even state trial court judges, when elected, "tend, at least subconsciously, to favor citizens of their own community and state." I am not implying that elected state judges are unethical; I have the highest respect for them. But in any elected official there is an undeniable interest in seeing the best for his or her constituents. And I think yet another of the Kansas attorneys who had written me had a particularly good point when he commented:

"I think that to a greater extent than is generally recognized, the presence of federal courts as a resort to the out-of-state plaintiff or defendant tends to keep state courts, bar associations and the impact of local prejudice on the judicial process considerably more in line than otherwise they would be."

Beyond the philosophical reasons, there are some practical reasons why I don't feel that forcing these cases to the state courts is a wise idea. In letters I received, my concern about the state courts also being congested was obviously shared by attorneys in my home State. One agreed with my assumption when he noted, "Many state courts are immensely more congested than the federal courts." In Kansas, attorneys with trial experience indicate that congestion has in fact settled in the state courts rather than in the federal court, and the problem appears to be particularly severe in the courts of urban areas like Wichita and Kansas City.

Testimony last year and related Subcommittee discussion focused considerable attention on the fact that some 24,000 cases would be removed from the federal courts by eliminating diversity cases of citizenship as a jurisdictional basis. It is argued that when distributed among the comparatively large number of state judges as contrasted to federal judges, the burden of those cases would be reduced. But I feel that the Subcommittee should give further attention to the likelihood that these diversity cases develop probably at least as rapidly as other cases in the very areas where state court backlogs are the heaviest.

I know it was pointed out to the Subcommittee last year that the median time between filing and trial of jury cases was considerably shorter in federal courts than in state courts in a number of municipalities in recent years. I think the fact is significant that a case can be taken up in 11 months in state court in Chicago while the time lag is 37 months in a Chicago federal court. In Brooklyn,

the figures are 35 months for state courts and 18 for federal; in Philadelphia, 47 months in state courts and 27 in the federal; and in Boston, 42 months in state courts and 34 in the federal system.

So what we are doing at least in those areas where there are high concentrations of cases is telling a significant number of people that they are now going to have to wait longer if this legislation is enacted. It just doesn't seem to me that this fits in with the whole effort to reduce delays in getting cases handled.

And there are some institutional problems that need to be carefully considered. A former President of the Kansas Bar Association pointed out that "the machinery of our State Court system is simply not adequate to reach across state lines to influence procedures in the ever growing complex litigation regarding interstate operations." And another attorney noted that "The federal system is ideally set up to handle these matters." When you consider the fact that state judges usually lack the kind of support services including law clerks to assist them that are available to members of the federal bench and the fact that state legislatures in this era of fiscal austerity are unlikely to provide the significant increases in funding necessary to provide the kind of support needed, I find it highly unlikely that the situation is going to improve markedly in the near future. Adding new cases, many of which would be increasingly complex, to the state court case-loads would only worsen the problem. It could be another factor which might encourage less-well-paid state judges to retire. I am sure none of you want to see this bill result in lowered quality on the state judicial benches.

Another indirect consequence which could result from this legislation is an unintended increase of total cases needing attention. Two factors could contribute to this problem as I see it. First, elimination of diversity jurisdiction could create a roadblock for the practice of centralizing like cases for consideration by multi-district panels. And, second, there could be a problem with additional proceedings in effort to enforce state court decisions in areas outside their jurisdictions. One Kansas attorney commented to me: "... in many cases the use of the Federal courts assists in the collection of judgments where judgments obtained in state court would be most difficult and would require a second or additional amount of litigation at the location where the defendant debtor could be found." That point was reinforced by the Kansas Bar Association where they said:

"State Courts, unlike the Federal Courts, cannot enforce their process beyond their jurisdictional boundaries unless for the most part, some cumbersome form of ancillary proceedings are initiated, which even then, due to the time factor involved, do not adequately protect the rights of the citizen."

Before I wrap this up, let me say that I certainly appreciate the hard work of this Subcommittee in its efforts to grapple with the problems created by the backlogs in the federal court system. You have been very effective in moving legislation through the process and provided a great service. However, I think that your success to date is one more reason why this legislation should not be rushed through. In the last Congress we created a large number of new judgeships; the appointments process is now underway. And significant modifications were made in the bankruptcy law which should alleviate additional pressures on the federal courts. Now, before we move ahead with this idea, I would think the Congress would be wise to let the changes we have already approved go into effect and then look at what still needs to be done. Personally, I have no problem with adjustments upward in the limit on amount in controversy to take into account economic realities, but I do think we should not go ahead with the abolition of diversity concept. It is one that has served our judicial system well and which I am convinced still has a legitimate and important purpose.

I urge the Subcommittee to reconsider its previous position and not report this measure.

Thank you for your attention and consideration.

Mr. GLICKMAN. Mr. Chairman, as you recall, I was one of the members on the floor last year when the diversity bill was brought up. I raised some objection and indicated some of my feelings about the concept of eliminating, that is, totally eliminating diversity jurisdiction.

I come here today to amplify on those comments and to outline my objections to the piece of legislation before you and, perhaps, to suggest some alternatives to you.

I have seen arguments that conditions have changed sufficiently in this country that the need for preserving Federal jurisdiction in cases

based on diversity no longer exists. My feeling has been that reasons do still exist for providing the option of Federal court jurisdiction in these cases, and that view was shared by a large number of Kansas attorneys who contacted me on this question last year. One attorney summed it up quite well:

"One of the original reasons for creating Federal courts was to give out-of-State parties an impartial forum in which to proceed. My experience with some State courts, both in this State and others, leads me to believe that the prior justification is still sound."

Another attorney noted, as a result of the development of a large number of product liability cases, that in a number of jurisdictions he felt, and he said that his view was shared by a large number of experienced trial lawyers, a defendant manufacturer simply cannot get a fair trial in certain State courts.

Statements like those and the fact that we are living in an increasingly mobile society and an increasingly complex one, convince me that there is today as much reason to preserve this basis for Federal court jurisdiction as when the Congress decided, nearly 200 years ago, to provide the authority available under article III.

A related point was raised by another congressional office last year in a call to my office, which was reiterated in letters from attorneys in my State. That is that in many States, State trial court judges are elected officials. As all of us, ourselves elected officials, realize, elected officials have a tendency to look out for the interests of their constituencies. And I must say that I agree with the view expressed in one of the letters I received on this matter that even State trial court judges, when elected, "tend, at least subconsciously, to favor citizens of their own community and State." I am not implying that elected State judges are unethical; I have the highest respect for them. But in any elected official, there is an undeniable interest in seeing the best for his or her constituents. And I think yet another of the Kansas attorneys who had written me had a particularly good point when he commented:

I think that to a greater extent than is generally recognized, the presence of Federal courts as a resort to the out-of-State plaintiff or defendant tends to keep State courts, bar associations, and the impact of local prejudice on the judicial process considerably more in line than otherwise they would be.

His point, that the option of the Federal court and judiciary acts as a good moral force on States' proceedings, is subtle but important.

Beyond the philosophical reasons, there are some practical reasons why I don't feel that forcing these cases to the State courts is necessarily a wise idea. In letters I received, my concern about the State courts also being congested was obviously shared by attorneys in my home State. One agreed with my assumption when he noted, "Many State courts are immensely more congested than the Federal courts." In Kansas, attorneys with trial experience indicate that congestion has in fact settled in the State courts rather than in the Federal court, and the problem appears to be particularly severe in the courts of urban areas, like Wichita and Kansas City.

Testimony last year and related subcommittee discussion focused considerable attention on the fact that some 24,000 cases would be removed from the Federal courts by eliminating diversity cases. It is argued that when distributed among the comparatively large number of State judges as contrasted to Federal judges, the burden of those cases would be reduced. But I feel that the subcommittee should give

further attention to the likelihood that these diversity cases develop probably at least as rapidly as other cases in the very areas where State court backlogs are the heaviest.

There was some testimony pointing out to the subcommittee the comparative length of delays in State courts versus Federal courts—for example, Chicago, Brooklyn, Philadelphia, Boston. Those studies, I admit, are not current, but the most recent I could get a hold of. Still, they make a valid point.

The study pointed out the problem of Brooklyn. The problem is clearly more severe in urban State courts than it is in rural State courts.

And there are some institutional problems that need to be carefully considered. A former president of the Kansas Bar Association pointed out that:

the machinery of our State Court system is simply not adequate to reach across State lines to influence procedures in the ever-growing complex litigation regarding interstate operations.

And another attorney noted that, "the Federal system is ideally set up to handle these matters." When you consider the fact that State judges usually lack the kind of support services, including law clerks to assist them, that are available to members of the Federal bench, and the fact that State legislatures in this era of fiscal austerity are unlikely to provide the significant increases in funding necessary to provide the kind of support needed, I find it highly unlikely that the situation is going to improve markedly in the near future. Adding new cases, many of which would be increasingly complex—for example, the multi-district product liability or drug litigation, medical malpractice litigation, and related things involving many millions of dollars in many States, but not involving a Federal question—through the State court caseloads would only worsen the problem.

It could be yet another factor which might encourage less-well-paid State judges to retire. I am sure none of you want to see this bill result in lowered quality on the State judicial benches.

Another indirect consequence which could result from this legislation is an unintended increase of total cases needing attention. Two factors could contribute to this problem, as I see it. First, elimination of diversity jurisdiction could create a roadblock for the practice of centralizing like cases for consideration by multidistrict panels. And, second, there could be a problem with additional proceedings in efforts to enforce State court decisions in areas outside their jurisdictions. One Kansas attorney commented to me:

... in many cases, the use of the Federal courts assists in the collection of judgments where judgments obtained in State court would be most difficult and would require a second or additional amount of litigation at the location where the defendant debtor could be found.

That point was reenforced by the Kansas Bar Association:

State courts, unlike the Federal courts, cannot enforce their process beyond their jurisdictional boundaries unless, for the most part, some cumbersome form of ancillary proceedings are initiated, which even then, due to the time factor involved, do not adequately protect the rights of the citizen.

Before I end the testimony this morning, I want to stress that I appreciate your hard work, particularly yours, Mr. Chairman, because you are known as a person who is working beyond the point of diligence in trying to find some answers to court problems in this country,

and you have been very sensitive in moving legislation through the process. You have been providing a great service.

But it seems to me that on this particular legislation which I know is being pushed very hard by Chief Justice Burger, we ought to be careful before we move headlong into such a charge; in light of the fact that last year we created 152 new Federal judgeships. The appointment process is now underway.

Significant modifications were made in the bankruptcy law which would alleviate additional pressures on the Federal courts. We are seeing legislation proposed to change our magistrates' power, to give them significant additional powers that could again alleviate additional nitty-gritty responsibilities of your judges.

I am not saying that they have it too easy. Federal judges have a very difficult burden. All I am saying is, let's not make it institutionally too easy for them.

I would suggest a better alternative than this measure would be to simply raise the jurisdictional amount in Federal diversity cases from its present level of \$10,000—which it has been, as I understand, I don't know how many years, but many—to a level which more accurately reflects the kind of level which would keep the simple automobile accident between a Kansas and Nebraska resident out of the Federal courts, perhaps \$100,000, perhaps \$75,000.

In addition, we might provide a mechanism to assess costs or make it more difficult for people to frivolously file diversity cases alleging the amount in question to be much higher than it actually is.

Now, I am not sure whether that can be done under existing law. I know the amount in question would have to be changed by statute. I don't know about the assessment of costs for people who frivolously file a lawsuit alleging the amount in controversy to be less than it is.

But I just suggest that as a better alternative while still preserving the Federal diversity situation, which many consumers are now finding it advisable because of service of process, because of enforcement remedies.

Because of those situations, Mr. Chairman, I would urge the subcommittee to reconsider its previous position and not report this measure, or if the measure is reported, to report it in the manner that I have suggested.

I thank the chairman and the subcommittee for listening to me this morning, and I would be glad to answer any questions.

I might mention to you, while I did practice law, I was not an active litigation attorney, but I had enough experience in the methodology of choosing which court I wanted to go into to know that I am not sure that the process is abused that much. I don't believe it is by attorneys, but I do believe that some modification may be necessary, and that's why I suggest raising the jurisdictional amount and making it more difficult to frivolously claim that amount.

Mr. KASTENMEIER. We had testimony yesterday from an able judge, Judge Hunter, whose jurisdiction, I guess, is Missouri rather than Kansas, that there were many, many subterfuges used to exploit and manipulate getting diversity cases into Federal court. And he cited quite a number of them.

So I am afraid that there has been conflicting testimony.

Mr. GLICKMAN. Mr. Gudger and I were talking about this for a moment coming over. Is there some way by court rule or by statutes

to provide a mechanism or incentive to assure that the amount in controversy as stated in the complaint or the petition is an accurate one? That is, is there any way, for example, if you and I have a car accident, and I break my arm and sue you for \$250,000, that you could manage to pay that?

Mr. KASTENMEIER. I doubt it. And as a matter of fact, I think the attorneys who are complaining about this bill most bitterly object to that more than anything else because tactically, and essentially theirs is the business of tactics, they do not want to be limited in that connection.

Do I understand from your testimony that you think the State court judges of Kansas are incapable of handling 400-odd diversity cases that are filed each year in Kansas Federal court?

Mr. GLICKMAN. No. As a matter of fact, in my State we have vastly expanded the number of State court judges. I shouldn't say in my State as a whole. In my particular area we have expanded the power. Our judges are still elected, though, on a partisan basis.

I just have a feeling that the richness that the Federal court offers should not be limited only to Federal question cases. I believe that, while there may be some abuse, and the court judge you are talking about may have pointed out some abuse, that particularly in large, multidistrict cases, diversity jurisdiction should not be foreclosed.

Mr. KASTENMEIER. At present, three-quarters of the cases filed in Kansas were filed by in-State plaintiffs. What have they to fear from State judges in Kansas?

Mr. GLICKMAN. Probably nothing.

Mr. KASTENMEIER. There is another proposal which raises the jurisdictional limit from \$10,000 to \$25,000 and bars in-State plaintiffs from suing in Federal court. You might be more congenial to that bill.

Mr. GLICKMAN. Yes; is that bill being considered by this subcommittee as an alternative?

Mr. KASTENMEIER. Well, it has been a traditional alternative for changing diversity jurisdiction. I don't know if it is in bill form at the moment or not.

It isn't, I am informed. But it was last year.

Mr. GLICKMAN. OK.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. GUDGER. I would like to ask of the Chair clarification about this pending bill, and that is this: Where the in-State plaintiff is barred from recourse on the \$25,000 or above jurisdictional amount, is removal available under this other act?

Mr. KASTENMEIER. As I understand it, there are two features. One is the \$25,000 across the board, raising all jurisdictional amounts to \$25,000, and also barring the in-State plaintiffs from resorting to Federal court. Removal for out-of-State defendants would be preserved.

Mr. GRUDGER. I would like to ask Congressman Glickman two very brief questions.

Congressman, I do notice that Kansas apparently has substantially more diversity actions initiated in its Federal courts than my own State of North Carolina, despite the fact that my State has twice the population of yours. So it does indicate that there has been more recourse to the Federal courts for diversity actions in your State.

Can you explain this differential?

Mr. GLICKMAN. I would probably say it is the location of the State. It is a crossroads of America. That may have something to do with it. That is, that the country is bifurcated by Kansas and by many interstate highways. There are a lot of distribution centers located in the State because of its location.

That could be a possibility. I don't know how many of those cases are what you would call simple accident cases or what the nature of them is, however.

Mr. GUDGER. Do you see any substantial difference in verdict experience in your State and Federal courts in personal injury litigation in the State of Kansas?

Mr. GLICKMAN. My personal experience has been no. But again, I wasn't an active litigator.

Mr. GUDGER. Therefore, you would, I presume, conclude that equal justice is administered between the two systems and the old argument, that there is a prejudice against the nonresident, does not reflect itself in the verdict experience.

Mr. GLICKMAN. I would hope so, but again I come from an urban area of the State, and my practice was limited to that urban area.

I am told by attorneys who practice in some of the less urban areas of the State, where judges have been there for many, many years, that the situation may not be exactly that way.

Mr. GUDGER. I did not have opportunity to hear testimony yesterday pertaining to jurisdiction shopping under the diversity rule, which I am sure is available where you have, for example, a railroad with lines going through many different States where jurisdiction can be sought in a particular area where the verdict experience is favorable to the personal injury claimant.

You are familiar with the fact that there is that opportunity available—

Mr. GLICKMAN. Sure.

Mr. GUDGER. Under the diversity patterns which now exist in our law?

Mr. GLICKMAN. That is correct, yes.

Mr. GUDGER. Do you see any alternative method of eliminating this jurisdictional opportunity, this shopping opportunity which is available to the personal injury claimant?

Mr. GLICKMAN. To be honest with you, because of my limited experience, I am not prepared to answer the question. But obviously, forum shopping in diversity cases where a cause of action may have arisen in many different States is a problem.

But I am not sure that that relates directly to the issue about which I am talking.

Mr. GUDGER. One final question. I don't know how much you have studied this problem, and the problem is relatively new to me, but you are aware that there have been a general growth of burden upon the Federal court system due to developing Federal legislation.

Mr. GLICKMAN. That's correct.

Mr. GUDGER. And you realize that the Federal courts are confronting this additional burden due to developing Federal legislation?

Mr. GLICKMAN. I might add that there has been an increasing burden on the State courts for the exact same reasons, too. I am not sure which has grown faster.

Mr. GUDGER. Can you give us any concept as to what proportion of your States civil caseload is composed of the 484 total diversity actions filed in 1975-76 and the 545 in 1976-77?

Mr. GLICKMAN. No.

Mr. GUDGER. Would you perceive that it might be less than 5 percent of the total civil litigation?

Mr. GLICKMAN. It could be, but I don't know.

Mr. GUDGER. No further questions.

Mr. KASTENMEIER. Do you have any questions?

Mr. SAWYER. Just one or two, Congressman. I assume that Kansas has not had anything near a one-third increase in its total State judiciary in the last couple years.

Mr. GLICKMAN. As a practical matter, there have been substantial increases in the judiciary in the last 18 months in Kansas in terms of personnel, but only in the urban areas.

Mr. SAWYER. In the last Congress we increased the Federal judiciary by approximately a third.

Mr. GLICKMAN. No, it hasn't increased a third. It has not increased a third, and if I may go back to Mr. Gudger's question, it is conceivable that reserving Federal court with the increasing number of judges we created changes in the bankruptcy court's rule and perhaps changes in the magistrates rule, may be more significant than anything else in the Federal judges and justice system, the Federal judiciary.

All you have to do now is consider Federal cases. It kind of fits into that whole cycle of creating more legislation to create more Federal courses of action, because they will have more time to handle those kinds of cases. That is not based in any fact. That is just philosophy.

Mr. SAWYER. I originally joined in the cosponsorship during the last Congress of this bill to eliminate diversity. But with an increase of one-third in the Federal judiciary, I am coming to the point of view that we ought to go slowly in removing this alternative jurisdictional aspect until we see how the additional one-third increase in the judiciary take care of the problems along with, as you point out, the expansion of magistrate jurisdiction and the expansion of bankruptcy court procedures too.

And because of that I have become hesitant. Now, I assume there are very many rural circuits in Kansas. I am not intimately familiar with Kansas, but generally so. And I presume that the judges out in those very rural areas are not exposed much to highly complex financial-type litigation, dealing with major questions of finance or business. Would that be a fair test?

Mr. GLICKMAN. I would say that, as a practical matter, you are correct. If those cases need to be filed, generally they will go to Wichita or Kansas City attorneys to have them filed, and probably, if the jurisdiction allows, will be filed in Federal court.

There is just a feeling that the U.S. magistrate, the clerks of the courts and judges themselves are far more capable of handling some of the complex, nonfederal question cases.

Mr. SAWYER. We have also an assortment of areas in Michigan. In my district of western Michigan we have eight cities of over 100,000, but we have some of the most rural counties or areas in the country too; vacationland, totally nonindustrial and that sort of thing.

Mr. GLICKMAN. You have Lake Michigan.

Mr. SAWYER. Well, the western Federal district is the entire western half of the State plus the entire Upper Peninsula, and there is great diversification, both urban and extremely rural.

And I am aware that we do have that situation in Michigan. I assume in many of the States that have both cities and rural areas, and your rural judges, while they are totally competent people, really have very little or no exposure to the more complex type of State litigations on non-Federal question litigations that might come up.

I think that is one of the reasons in Michigan, for example, that if there is any basis for it, usually that kind of litigation is by option put into the Federal courts. I presume also from an out-of-State litigant's point of view that the Federal courts are physically a lot more accessible by air and other things than some of the rural counties.

Mr. GLICKMAN. That is very true.

Mr. SAWYER. And I know that would be equally true in my State.

I guess that is all I have. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you

Mr. GLICKMAN. Thank you, Bob, and members. I appreciate the appearance.

Mr. KASTENMEIER. May I ask my friend, Mr. Sawyer, a question? I thought Phil Ruppe had represented upper Michigan. Do I have that wrong?

Mr. SAWYER. No; I was speaking of the Federal western district. No; I don't come anywhere near representing the whole Federal district, but from the court system point of view, Ruppe's district is in my bailiwick as far as the Federal court is concerned, the western district of Michigan. It is the biggest, I think physically the biggest, in the country.

Mr. KASTENMEIER. Incidentally, the Chair will state that we are in session early today. Consequently, we would like to move things along. We will have three further witnesses. We have just heard Congressman Glickman. Next we will have Professor Rowe of Duke University Law School, then the Association of Trial Lawyers of America, represented by Mr. Robert Begam, and the Conference of Chief Justices, with two witnesses.

I suggest this to members, so they can see what the morning agenda is and also to suggest to witnesses, if you have rather long statements, that you might like to try to summarize your points of view. However, time permitting, you may proceed as you wish.

At this time I would like to invite most cordially Prof. Thomas Rowe of the Duke University School of Law to come forward as a witness.

You are not, as I recall, Professor Rowe, new to the Hill. You have worked, as I understand it, for the Senate Judiciary Committee, and so we most cordially invite you back to Congress again. You also were a law clerk to Supreme Court Justice Potter Stewart and have had a distinguished career.

In any event, Professor Rowe, you may proceed as you wish, sir.

TESTIMONY OF PROF. THOMAS D. ROWE, JR., OF THE LAW SCHOOL OF DUKE UNIVERSITY

Mr. ROWE. Thank you for your welcome, Mr. Chairman. As you suggest, I plan not to read my statement in its entirety, but if there is unanimous consent, I understand it can be entered into the record.

Mr. KASTENMEIER. Without objection.
[The statement of Professor Rowe follows:]

STATEMENT OF THOMAS D. ROWE, JR., ASSOCIATE PROFESSOR, DUKE UNIVERSITY
SCHOOL OF LAW

My name is Thomas D. Rowe, Jr., and I am an Associate Professor of Law at Duke University in Durham, North Carolina. I have received a B.A. in political science and economics from Yale University, a B.Phil. in comparative literature from Oxford University, and a J.D. from Harvard Law School. I served as a law clerk to Associate Justice Potter Stewart in 1970-71 and then was a staff attorney for a subcommittee of the Senate Judiciary Committee. I practiced law here in Washington for two and a half years before going into teaching at Duke in 1975. My teaching and writing have been in the areas of civil procedure and constitutional law.

As this body has been considering the abolition of diversity jurisdiction, I have tried to identify what the effects of such a step would be beyond those usually mentioned. The Office for Improvements in the Administration of Justice of the United States Department of Justice has provided a grant to support this work, and I have completed a study entitled "Significant Nonobvious Effects of the Abolition of the General Diversity Jurisdiction" for the Department. The views I express in the study and today are, of course, my own. I have also completed an article entitled "Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms," which is to appear in this month's issue of the Harvard Law Review. [See Appendix 2(b)].

The points that tend to receive the most attention in the debate over abolition are such matters as how much prejudice against out-of-state litigants survives in state courts, how much reduction there would be in federal court caseloads, and how desirable it would be to transfer the state law determinations involved in diversity cases to the state courts. On these issues my views are generally in accord with those expressed by witnesses you have heard in the past supporting abolition, such as Judge Friendly and Professor Wright.

On those questions, however, I feel I have little to add. What I hope can be useful to this Subcommittee and to the Congress in considering the abolition proposal is the results of the work I have been doing on other effects of the measure. To summarize my conclusions before getting into further explanation, the previously little-noticed side effects of abolition would be significant and, virtually without exception, highly beneficial. Moreover, most of the benefits I have been able to identify would not come about from measures short of abolition, such as limiting diversity jurisdiction to out-of-state plaintiffs as the American Law Institute proposed several years ago.

To talk about the effects I have mentioned, I need to offer some background explanation. You may have memories from law school or practice—possibly unpleasant ones—of something called the "complete diversity" rule. That rule, established in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), requires that for federal diversity jurisdiction all plaintiffs must be of different state citizenship from all defendants. A few diagrams may be useful to illustrate the working of the rule:

[\$10,000 in controversy assumed throughout]

(1) No diversity—no federal diversity jurisdiction:

Plaintiff (Illinois) *v.* Defendant (Illinois)

(2) "Incomplete" or "minimal" diversity—also no federal diversity jurisdiction:

Plaintiff (Illinois) *v.* Defendant (Wisconsin)

and

Defendant (Illinois)

(3) "Complete" diversity—federal diversity jurisdiction:

(a) Plaintiff (Illinois) *v.* Defendant (Wisconsin)

or

(b) Plaintiff (Illinois) *v.* Defendant (Wisconsin)

and

Defendant (Indiana)

That may not look too complicated, and applying the complete diversity requirement to a plaintiff's original complaint is in fact not usually a problem. But the rule starts presenting extraordinarily difficult questions when it has to be applied to cases involving the later joinder of additional parties, which the modern approach of the Federal Rules of Civil Procedure encourages through such devices as third-party complaints and intervention.

Many of the benefits I foresee from abolition would come about simply because without diversity jurisdiction, courts and litigants would not have to face the many complex problems that the complete diversity rule engenders. You may wonder whether it would not be more sensible simply to overrule the complete diversity rule, which Congress may do by legislation since the Supreme Court has made it clear that the rule is merely an interpretation of the diversity jurisdiction statute. But keeping diversity jurisdiction while overruling the *Strawbridge* requirement would probably increase the federal courts' diversity caseload greatly, which would add to a good many other present difficulties rather than reducing them.

Moreover, the non-obvious benefits of abolition would not be only those of getting rid of the complete diversity rule. In brief, the effects my study has identified are of three main kinds: sheer reduction in the incidence of difficult jurisdictional and procedural issues mostly connected with, or unique to, diversity jurisdiction and the complete diversity requirement; facilitation of judicial rethinking of some areas of federal pendent and ancillary jurisdiction that have often been confined and confused by diversity problems; and paving the way for some possible further statutory and rule reforms in federal practice and procedure. In other words, there would be some problems that courts and litigants simply would not have to face any more; some case law that the courts might profitably rethink because of the influence that diversity problems have had; and some measures that the Congress or the rulemakers might like to adopt that would be easier after abolition.

In the first category of problems that would have to be faced much less or not at all, an obvious example is the determination of just what state a party is a citizen of. Much of the time that determination is an easy one, but with mobile people and multistate corporations it can get quite complex and time-consuming; furthermore, if it turns out later to have been mistaken, it can result in an otherwise valid decision's being thrown out and sent to state court for an entire new trial. Another determination that should much less often be seriously contested if diversity were abolished is that of realignment; presently, litigants sometimes contest whether a party should be aligned as a plaintiff or a defendant. Usually, the only reason why alignment is worth caring about is that it would preserve or destroy federal jurisdiction based on diversity; after abolition, there would be many fewer occasions when parties would have any reason to invest their own time and that of federal judges in this issue.

A somewhat more complex problem is that of collusion to invoke federal jurisdiction, which is a concern unique to diversity jurisdiction because of the opportunity to create diversity by, say, assigning your claim against your own co-citizen to an out-of-stater. Congress has told the federal courts, in section 1359 of the Judicial Code, not to let this happen, which is sensible enough given that it would otherwise be much too easy to get into federal court; but the determination whether some tactic that creates diversity or otherwise seeks to evade restrictions on federal diversity jurisdiction is improperly collusive is often a difficult one, and one that would be unnecessary after abolition.

These are not the only examples of the first general type of beneficial side effect I have mentioned, reducing or eliminating several difficult determinations necessary because of the requirements for federal diversity jurisdiction. In fact, the examples are the less complicated ones among effects of this type I have identified. However it may appear, I have not been trying to illustrate confusion by creating it; the point is that diversity jurisdiction forces these and much more complex problems on federal judges and practitioners, and all of them have little or nothing to do with the merits of the dispute the parties are trying to have adjudicated. Abolishing diversity, finally, would not transfer these problems to the state courts, because the difficulties are all the result of basing federal jurisdiction on the citizenships of the parties; since state courts do not usually have to look to parties' citizenships to determine whether they have jurisdiction, they would not inherit these difficulties that the federal courts face now.

The second general type of effect would be the probable elimination of some confused and restrictive case law on procedural problems in the federal courts that has been influenced by diversity considerations. The Federal Rules of Civil

Procedure, in an effort to promote economy and convenience for courts and litigants, have quite liberal provisions for adding related claims and parties after a dispute is already in federal court; the idea is to allow the settling of related matters in one litigation. One such provision is "impleader" under Rule 14, which lets a defendant join a third party who may be liable to him for the plaintiff's claim. In other words, someone—like an insurance policy holder—can bring in a party who may have to indemnify him—like his insurance company, in effect saying that if I owe the plaintiff then you owe me. The rule lets all that be settled in one trial rather than two.

The rule also lets the plaintiff and the third-party defendant claim against each other directly if they have such claims, and this is where diversity jurisdiction has caused problems. To resort to a diagram again, say that an Illinois plaintiff brings a proper diversity suit in federal court against a Wisconsin defendant. The Wisconsin defendant impleads a third-party defendant who may be liable to him, and that party happens to be from Illinois.

Plaintiff (Illinois) v. Defendant (Wisconsin)

v.

Third-party defendant (Illinois)

If the federal court lets the plaintiff do what the rule permits and add his claim against the third-party defendant, then the plaintiff has accomplished precisely what the complete diversity rule says he may not do—bring a federal diversity action against two defendants, one of whom is from his home state. Just last year, the Supreme Court settled that such claims, when there is no other basis of federal jurisdiction such as a federal question, cannot be included in a diversity case. (*Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365 (1978).)

This much does not seem to be all that problematical. The trouble has been that the lower federal courts have not always considered whether it makes sense to apply such restrictions beyond the diversity situations in and for which they were evolved. And in some cases, courts handling federal question cases have relied uncritically on language from diversity actions, frustrating efforts at joinder on the basis of rules developed in diversity litigation to deal with problems created by the *Strawbridge* complete diversity rule. What abolition would eliminate is the basis for this sort of muddled carryover effect, making it easier for the federal courts to consider on its own merits the question whether such joinder should be permitted in federal question cases.

The third type of effect would be the elimination of certain obstacles diversity jurisdiction now poses for some possibly desirable reforms in federal court jurisdiction and procedure. To give just one example, it might be useful if the federal courts could have a single uniform provision for nationwide service of process to bring parties before them. Instead, what we have is a patchwork of statutes providing for nationwide service in particular types of cases, plus a general provision that for the most part limits federal courts' process in other cases to the long-arm authority of the state in which the federal court is sitting. A problem that arises mostly in diversity cases seems to be the main reason for this restriction. Under prevailing rules for choice of law by the federal courts, a federal court in a diversity case must follow the conflicts law of the state in which it sits. Nationwide service going beyond the state's long-arm provision might bring before a federal court a party who could not have been sued in the courts of the same state; the conflicts practice might then subject that party to a rule of substantive law that could otherwise not have governed his conduct, and that is generally regarded as unfair. Abolishing diversity would eliminate most of the situations in which this problem could arise, which might make a uniform nationwide service provision much more attractive.

What all these effects suggest is that there is an additional, major set of considerations in favor of abolishing diversity jurisdiction—the simplification of federal practice by reducing or eliminating some of the thorniest procedural difficulties that federal courts and practitioners in them must face, plus the creation of opportunities for further improvements. None of this is to deny that the supposed benefits of having diversity jurisdiction are genuine ones, but any such benefits do appear to come at an even higher cost than we had realized. (The complete diversity rule, incidentally, means that your ability to take advantage of the diversity jurisdiction often depends on what may be a fluke—whether citizens of the same state happen to get involved on both sides of a dispute, which may have nothing to do with whether there is local bias against an out-of-stater who is also involved.)

Sometimes there is debate over whether it is the proponents of abolishing diversity, or those who would keep it, who should have the burden on the issue. John Frank argued to you in the last Congress that before abolishing diversity, we should be able to see "clear-cut good in it." What I think I can fairly conclude from my work is that there is such a good, and that even if the burden is on the abolitionists it is one they can satisfy.

As the foregoing reflects, in my judgment the diversity jurisdiction should be abolished; and the bill reported out by this Subcommittee and passed by the House in the last Congress, H.R. 9622, is a good bill. There is, however, one change that could make it even better. H.R. 9622, while abolishing the "general" diversity jurisdiction for cases between citizens of different states, retained the "alienage" jurisdiction of the federal courts over disputes between citizens and aliens. My concern is not with whether you should keep this type of jurisdiction; it is that if you do keep it while reporting out a bill abolishing general diversity, I would strongly urge you to include a provision overruling the complete diversity requirement for alienage cases. Instead, it should be enough for there to be "minimal" diversity—when of any two adverse parties one is a citizen of an American state and another is an alien, without regard to other litigants and their alignment.

The federal courts have held the complete diversity rule applicable to alienage cases as well as to those within the general diversity jurisdiction; but the Supreme Court has made it clear that the rule is purely a matter of statutory interpretation and subject to change by Congress. (*E.g., Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978).) As troublesome as the complete diversity rule is in cases between citizens, its effects are even worse in the alienage jurisdiction. To begin with, it produces an irrational and complicated crazy quilt pattern for cases involving citizens opposing aliens. As the rule is applied in alienage cases, either state co-citizens or co-aliens as adversaries destroy complete diversity and thus federal alienage jurisdiction. Thus, if an alien or aliens oppose a citizen or citizens, with no other parties involved, there is jurisdiction:

(1) Complete diversity—federal alienage jurisdiction:

Plaintiff (England) v. Defendant (New York)

or

Plaintiff (New York) v. Defendant (England)

Similarly, if citizens of completely diverse citizenship oppose each other and an alien or aliens are also involved on just one side, the federal courts have jurisdiction:

(2) Complete diversity—federal jurisdiction:

Plaintiff (New Jersey) v. Defendant (New York)

and

Plaintiff (England)

But because of the complete diversity rule, if there are aliens on both sides and citizens on only one, there is no federal alienage jurisdiction:

(3) Incomplete diversity—no federal alienage jurisdiction:

Plaintiff (Massachusetts) v. Defendant (England)

and

Plaintiff (Ireland)

Also, if there are aliens on one side but incomplete diversity between citizen adversaries who are also involved, there is no federal alienage or diversity jurisdiction:

(4) Incomplete diversity—no federal alienage or diversity jurisdiction:

Plaintiff (Massachusetts) v. Defendant (Connecticut)

and

Plaintiff (Ireland)

and

Defendant (Massachusetts)

Just by itself, this pattern is confusing and arbitrary enough. What is worse is that it excludes from federal court cases that should be there according to what are commonly accepted as the reasons for having the alienage jurisdiction. There seem to be two such reasons: the concern about state court bias against outsiders that also applies to general diversity jurisdiction, and the possibility

of affecting United States foreign relations by the treatment of aliens in our courts. Under the crazy quilt pattern outlined above, the complete diversity rule excludes from federal court some cases that might affect our foreign relations just as much as cases allowed in. Moreover, the rule gives a citizen plaintiff the ability to manipulate his suit to block an alien defendant from all access to the federal courts, whatever the possible bias against the alien or the foreign relations repercussions, if the plaintiff can find a citizen of his own state who would be a proper co-defendant. Finally, keeping the complete diversity rule for alienage cases would preserve in miniature the many complex and difficult problems that it raises now. The rule, in sum, is an egregiously bad one for alienage cases.

If the Subcommittee decides to report out a bill abolishing general diversity but keeping the alienage jurisdiction, it could make that jurisdiction fulfill its purposes and eliminate many of the present problems by overruling the complete diversity requirement. Such a measure should not threaten any large increase in federal dockets because the alienage caseload is small. If the Subcommittee is inclined to adopt this suggestion, one way of drafting such a provision would be to replace the present 28 U.S.C. § 1332(a) (1976) with the following:

The district courts shall have original jurisdiction of all civil actions in which the matter in controversy exceeds the sum or value of x dollars, exclusive of interest and costs, and—

(1) one of any two adverse parties is a citizen of a State and the other is a citizen or subject of a foreign state; or

(2) is between a foreign state, as defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(Subsection (2) is to preserve the present 28 U.S.C. § 1332(a)(4) (1976), recently enacted to provide jurisdiction in cases involving foreign states as plaintiffs in American courts.)

There may be good reasons for not proceeding with this amendment at the moment, and I definitely am not implying that there should be no abolition of general diversity jurisdiction if you do not also overrule the complete diversity requirement for alienage cases. Very much to the contrary, I think H.R. 9622 as passed by the House in the last Congress was a good bill and endorse it wholeheartedly. This suggestion is simply to propose a modest way in which good legislation might be made significantly better.

Professor ROWE. Something that you may hear mention of occasionally from people watching the legislative process is what I have heard referred to as the law of the unintended consequences—the idea being that you always seem to accomplish something different from, or at least in addition to, what you set out to do, perhaps sometimes even defeating your original purpose.

What I have been doing, as this subcommittee and the Congress generally have been considering whether diversity jurisdiction should be abolished, is trying to figure out what would be the generally unanticipated consequences of abolishing the diversity jurisdiction. Subject to the usual limitations on human foresight, I am in the happy position of being able to tell you that my conclusion is that the effects of abolishing diversity would be far better than most people had been aware of.

I have been looking into several different kinds of side effects, if you will, of abolishing diversity that I want to try to give some examples of.

The usual kinds of effects that people talk about are such problems as how much prejudice remains against out-of-Staters in State courts, how much of a reduction there would be in Federal court caseloads, how much the States could absorb the addition, how important it is or isn't to reduce Federal court caseloads now, and the desirability of moving State law determinations to the State courts. On these points my views are generally in accord with those expressed by witnesses that you have heard who have supported abolition in the past, such

as Judge Friendly and Professor Wright. But these are questions on which I don't feel I have all that much to add.

What I want to try to offer is something that I hope can help the subcommittee a little bit—more on the side effects of abolishing diversity. To summarize my conclusions before getting into them in more detail, I think that these relatively little-noticed side effects would be significant and, virtually without exception, very highly beneficial. Also important, I think, is that nearly all of these benefits would not come about from measures that stop short of full abolition, such as the possibility of just limiting the diversity jurisdiction to out-of-State plaintiffs.

To talk about these effects that I have mentioned, I have to offer some background explanation. All of you being lawyers, you may have some memories from law school or practice, and maybe they are unpleasant ones, of something called the complete diversity rule. It was established in a case decided by Chief Justice Marshall in 1806 called *Strawbridge v. Curtiss*. It is reported that in fact Chief Marshall later expressed regret the *Strawbridge* case had been decided the way it had.

But what it requires, and it is still very much a part of the interpretation of the diversity statutes, is that for Federal diversity jurisdiction all plaintiffs must be of different State citizenship from all defendants. In my statement on pages 2 and 3 I have some diagrams to try to illustrate how it works when you have plaintiffs and defendants whether a claim can be added, or whether a party can be added once you have had a case already in the court. Then people who are from the same State involved in the case start trying to add claims against each other, and there is no simple resolution of it either way.

And the rule is very well established—the Supreme Court has recently reaffirmed it—as a matter of statutory interpretation under the diversity statutes. Applying it to people's original complaints is not all that difficult, but it does start presenting the courts with extraordinarily difficult problems of whether a case can remain before them, whether a claim can be added, or whether a party can be added once you have a case already in the court. Then people who are from the same State involved in the case start trying to add claims against each other, and there is no simple resolution of it either way.

Sometimes the courts have allowed certain kinds of claims between parties from the same State which they couldn't bring under the diversity jurisdiction as an original matter. In other types of situations they have decided they can't allow this kind of thing, so there is a rather confusing patchwork as a result of the working of the complete diversity rule here.

There is a question that you might ask yourself. Would we be throwing the baby out with the bath water if we get rid of the diversity jurisdiction? To get rid of these problems with the complete diversity rule, shouldn't we just overrule the complete diversity rule?

The trouble is, that would make a good many other cases subject to Federal jurisdiction. And I have the impression that is not the sort of thing this subcommittee or the Congress in general is inclined to do. It would get rid of a good many of these kinds of problems that I am talking about, but not all of them, because I am also talking about some other problems related to the diversity jurisdiction other than those that have to do with the complete diversity rule. But in any

event, it would probably considerably increase the Federal diversity caseload.

The kinds of effects that I am talking about are three main kinds. One is, as I have mentioned, some difficult jurisdictional and procedural issues that the Federal courts have to face mainly because of the existence of the complete diversity rule. If you don't have the diversity jurisdiction, then these kinds of issues are simply not going to come before the Federal courts. They are also not going to come before the State courts either, because they are the result of the fact that diversity jurisdiction rests on the citizenship of the parties, and State courts' subject matter jurisdiction does not rest there. They are courts of general jurisdiction. So abolishing diversity would not transfer these knotty procedural points to the State courts. They would disappear; to the extent that Federal diversity jurisdiction was abolished, these problems would simply disappear entirely because they are unique to the diversity jurisdiction.

That is the first kind, these difficult procedural problems. Then, the second kind is that some of these diversity issues have caused what strikes me as muddled judicial thinking. The Federal courts have evolved rules in diversity cases to deal with diversity problems, and they have not always considered related problems in Federal question cases independently. They have sometimes evolved a rule in diversity cases for some type of situation because of diversity problems and then just uncritically applied it to Federal question cases.

And again, abolishing diversity, it seems to me, would make it easier for the Federal courts to approach those problems without the kind of confusing influence that diversity now overexerts in Federal question cases.

The third kind of effect that I am talking about is some statutory or rule reforms that diversity now in one way or another presents an obstacle to. Of course, such reforms would have to be considered on their individual merits, but there are certain kinds of measures that might be desirable ones for the Federal judicial system, such as uniform nationwide service of process, and diversity poses some rather complex obstacles to these.

In the research that I have been doing, going back in the materials on why the rulemakers adopted certain rules, you can see that they felt they couldn't do certain things because of the effects that their rule might have if it were applied in diversity cases, and getting rid of the diversity jurisdiction would eliminate this kind of problem and make it possible to consider these kinds of reforms without worrying about these sorts of effects that would come up in diversity cases.

Let me then try to give a few examples of the kinds of effects that I am talking about in these three main categories. The first is some jurisdictional and procedural problems that would have to be faced much less or not at all. Prof. David Currie of the University of Chicago, who has also done work in this area, has referred to the "enormous infrastructure that has grown up to support and define the diversity jurisdiction," and these are examples of this kind of infrastructure.

A first very basic example is the determination of what State a party is a citizen of. A lot of times that isn't a problem, but when you are dealing with mobile people or multi-State corporations, it often presents a good deal of difficulty. The Federal rule on the citizenship of a

corporation, for example, is that it is a citizen of the State in which it is incorporated, but also of the State where it has its principal place of business. The Federal courts have different tests for that. Some say it is where you have your largest operation. Others say it is where you have your headquarters. Well, a lot of corporations have their headquarters in New York and their largest operation in Ohio or something like that, and the courts are just plain split on how to handle that. The result is both inconsistency, as the difference in rules indicates, and in some cases a good deal of complexity. This is the type of thing the Federal courts would have to face much less or not at all if the diversity jurisdiction were abolished.

There is another kind of determination, to give one other example here—that of the alignment of parties, whether somebody should be treated in a case as a plaintiff or a defendant. A lot of the time it just doesn't make any difference; it is merely a formal label, and it doesn't really make all that much difference for purposes of the litigation, so people often don't have any reason to invest their resources in contesting the issue. But with the complete diversity rule, if you have, say, a diversity case in Federal court with two parties from Wisconsin on one side of the case, then there can be an argument that one of them should be moved over to the other side; and if he does get moved over, the case has to be thrown out of Federal court because of incomplete diversity. That can happen even after the parties have been litigating for a while, since the realignment determination can be made on what comes out in the litigation of the case. So the case can then have to be thrown out because of this realignment, which can have very wasteful effects. If you didn't have a jurisdiction resting on the citizenships of the parties this way, you wouldn't have people with much reason to fight over this kind of thing.

Another example of this type of effect is that of collusion to invoke Federal jurisdiction. Because of the attractiveness to many people of the Federal forum, people will often do various things to take advantage of it. Some people have been known even to move across a State border to change their residence to get Federal jurisdiction. Another thing that the Federal courts have encountered is people trying to assign a claim to someone from out of State in order to create diversity jurisdiction.

Congress has sensibly tried to crack down on this kind of thing, because it is something of an abuse if you have basically a one-State litigation and somebody, by assigning a claim to another party, can get it in the Federal court. Though Congress has tried to crack down on it, you still have the problem of facing the efforts, having to make the determination whether a particular kind of collusion is one that is so bad that the Federal courts should throw the case out because of it, or whether it is something that should be permissible.

An aside here, inspired by something that Congressman Glickman mentioned: He was talking about the possibility of measures to sanction people who inflate the jurisdictional amount in diversity cases. There are such provisions already in the general Federal question and diversity jurisdiction statutes; if it turns out at the end of the litigation that the recovery is less than the jurisdictional amount, there can be cost shifting to the defendants. Even though the plaintiff wins, the costs could be imposed on him. My impression is that these provi-

sions have simply been used very, very little. In other words, there has been an effort in that direction, but not much seems to have come of it.

There was one other thing I had wanted to mention here, also inspired by Congressman Glickman's remarks. He mentioned problems of judgment collection between courts of different States. A fair question, when I am going through what strikes me as considerable benefits from abolishing diversity, is: Would abolition come at unacceptable costs? Increased difficulties with things like judgment collection could be that sort of cost, if it is in fact there.

But there is a uniform State statute that is adopted in many States providing for innerstate collection of judgments. The Federal courts have a statute that permits someone to take a Federal court judgment from one district into a Federal court in another district, simply register it there and collect on it. Several States have a similar statute for judgments of courts of other States. The others could easily adopt statutes that provide for the fairly automatic, easy procedure that many States do have already. In other words, this kind of cost that diversity might have is often not the sort of thing that would necessarily be incurred, or at least it could be handled by improvements in State courts' procedure.

The second type of effect that I have mentioned is the elimination of some confusion in procedural case law in the Federal courts that results from having the diversity jurisdiction. The kinds of situations in which this problem tends to arise most are those involving one form or another of effort to add parties after the litigation has begun. A good example of that comes up under the rule on third-party defendants. If a plaintiff sues a defendant, and there is someone like an insurer who may be liable to the defendant, and the insurer is not already in the case, then the defendant can simply implead the third party, bring him into the litigation.

The idea of having rules like this is to let the whole dispute get settled in one round rather than two, and when it works, when it is permissible, it is a very sensible and helpful kind of procedure.

The same rule that provides for impleader like that also provides for the plaintiff and the third-party defendant to state claims against each other if they have them. And in that situation, you can end up with problems with the complete diversity rule.

Suppose that the plaintiff sues an out-of-stater. The out-of-stater brings in someone who happens to be from the same State as the plaintiff, and then the plaintiff and the out-of-stater want to claim against each other. This kind of thing often happens in construction litigation, say, when you have subcontractors. What the Federal courts have ended up holding is that the plaintiff in that situation cannot claim against the third-party defendant because it is the kind of case that the plaintiff couldn't have brought as an original matter if he started out in diversity. He couldn't have sued, because of the complete diversity rule, someone from his State and someone from another State.

The trouble is that some Federal courts have been taking that rule and applying it unthinkingly in Federal question cases to which diversity or a lack of diversity is simply irrelevant. But there often seems to be something of a fog that sweeps in because of diversity problems, and courts extend diversity rules to situations they don't necessarily

have any relation to. What abolition of diversity would allow is for the courts to consider, independently of possible confusing factors from diversity, whether addition of claims in situations like that should be permitted in Federal question cases. That is just one example of this second kind of effect I am talking about, of confusing effects on procedural case law from diversity rules.

The final kind of affect that I want to mention is the elimination of some obstacles that diversity jurisdiction now poses for what might strike a good many people as desirable reforms. One example of this is the possibility of nationwide service of process for the Federal courts.

What we now have is something of a patchwork. We have several statutes for particular types of Federal question cases, providing for nationwide service. If the case is properly before a Federal court anywhere, and it can find the parties that ought to be part of the case, it can serve them with process under these special statutes. But the general rule, when you don't have one of those special statutes, is that the Federal court is confined to the service of process rule of the State in which it is sitting.

The reason for confirming Federal courts' process this way has to do, in large part anyway, with some fairly complex problems relating to choice of law that I spell out in my statement and don't plan to go into in detail unless someone is interested. Those problems come up mainly in diversity cases, so if you didn't have the diversity cases that raised that problem most, it might be a lot easier, if people thought it was a good idea generally, to go ahead and enact a uniform provision.

There is one other thing I wanted to mention in this connection, again inspired by some of the remarks of Congressman Glickman. He talked about the utility of the diversity jurisdiction in complicated interstate cases, when you have interstate operations, and the ability to consolidate proceedings, which is certainly something that the State courts didn't have. The problem is that diversity jurisdiction often doesn't respond to that problem at all well. What diversity often does, in fact, is split litigation. You have, say, a defendant, the airline or something like that, from one State, and you have plaintiffs from many States, that defendant's own State and many other States. Well, those who are from the defendant's own State are confined to the State courts of their own State, because they are not eligible for the diversity jurisdiction, but those who are from a different State from the defendant can take advantage of the Federal diversity jurisdiction. So you end up, in fact, with the existence of the diversity jurisdiction causing the litigation to be split because some of the plaintiffs are eligible for diversity jurisdiction, and some are not, and those who are usually are going to take advantage of it.

So in some senses the diversity jurisdiction actually poses problems for this kind of multistate litigation. What I try to suggest in my article—I have an article coming out in this month's issue of the *Harvard Law Review*, going into all of this in considerably greater detail—is that, if we abolish diversity jurisdiction, it might then become easier to engage in some more focused thinking on just what is the type of interstate dispute for which the Federal courts would afford an appropriate forum. We could go ahead and create a special jurisdiction for that, something that would respond to the legitimate problem that Congressman Glickman raises, but that I suggest, the diversity juris-

diction is a fairly random response to. Sometimes, if you happen to have everybody being diverse, diversity jurisdiction does solve the problem, but that is often not the case.

Mr. KASTENMEIER. On that point, I think Congressman Danielson raised that in the last Congress. And there is some interest in the so-called airline crash case, and in similar circumstances.

Mr. DANIELSON. Would the chairman yield briefly?

Mr. KASTENMEIER. Yes.

Mr. DANIELSON. I am going to send you, Professor Rowe, a copy of the bill which I reintroduced this year. It is not my work product. It is maybe my legislative effort for the year. But Judge Pearson Hall in Los Angeles, who has handled many of the major air crash cases, put together an ad hoc committee of judges, lawyers, professors, plaintiffs, defendants. He has tried to cover the entire discipline pretty well, and they have worked for 7 or 8 years constructing the bill which is directed toward establishing a Federal jurisdiction on aircraft disaster to try to go a step beyond the multidistrict litigation situation.

I will send you a copy for whatever comments you might like to have.

Professor ROWE. I would appreciate that. And it strikes me, that the aircraft situations are not necessarily the only ones to which it would be applicable. This is the kind of situation for which we could use an action-consolidating device generally. In drug company mass claim litigation, for example, it could also be a very valuable idea.

Mr. DANIELSON. I am trying to collect opinions of people who are interested. So I am going to send you an invitation.

Professor ROWE. Thank you.

Mr. DANIELSON. The Paris air crash case, a DC-10, about 4 or 5 years ago resulted in more than 250 separate lawsuits. It gives you an idea of the magnitude of the thing.

Professor ROWE. Just a few things in wrapping up. One is that the effects that I am talking about, of course, are effects that are very much apart from caseload reduction matters. These are problems that exist in the Federal courts whether the diversity caseload is fairly large or fairly small, and what I am suggesting is that there is a significant benefit from abolishing diversity, even apart from things like reducing the caseload.

One other thing you often hear in hearings like this—in fact, there is an example of it in the statement that you will hear from the trial lawyers later today—is argument over whether it is the proponents of abolishing diversity or those who would keep it who should have the burden on the issue. John Frank argued in the last Congress that, before abolishing diversity, we should be able to see “clear-cut good in it.” The trial lawyers say there are no substantial reasons, apart from reducing caseload, for abolishing diversity.

What I think I can fairly conclude from my work is that there are substantial reasons. There would be substantial independent good in abolishing diversity; and even if the burden is on the abolitionists, it is one that they can satisfy.

There is just one footnote I would like to add. If the committee proceeds with an abolition bill, it may retain the alienage jurisdiction, a separate, smaller jurisdiction, for disputes between citizens and aliens, as opposed to disputes between citizens of different States. I have no particular views whether it should be retained or not, but if it is

retained, what I would urge you to do is to include a provision overruling the Strawbridge requirement, the complete diversity rule, for alienage cases.

The courts have interpreted the complete diversity requirement to apply to alienage cases as well as to the general diversity of citizenship cases. The Supreme Court has made it very clear that it is only a requirement of statutory construction that Congress is free to overrule. And without going into detail, which I do spell out in my statement, the application of the complete diversity rule in alienage cases creates even a worse mess than some of the problems that it creates in general diversity cases. On pages 10 and 11 I have an illustration of a crazy quilt of situations involving cases with citizens opposing aliens. Some of them come within the diversity jurisdiction. Some of them don't, and there is no particular rhyme or reason to it. It is just the way the courts have interpreted how the diversity rule applies.

It is a crazy quilt that is by itself confusing, arbitrary, and complicated. Even worse, I suggest that it is something that runs very much against the purposes of having the alienage jurisdiction. Part of the reason for having alienage jurisdiction is concern for bias against aliens, but there is an independent jurisdiction for it which is simply concern for the quality of justice that aliens receive in our courts and the possible foreign relations implications of the treatment that aliens receive in our courts.

The trouble is that the application of the complete diversity rule in alienage cases keeps out of Federal courts a good many cases that could raise that concern just as much as the alienage cases that the complete diversity rule allows in.

So I would urge the subcommittee, if it does report on a bill abolishing diversity but retaining the alienage jurisdiction, to include a provision overruling the complete diversity requirement in alienage cases. Toward the end of my statement, at the bottom of page 12, I include suggested language by which the committee might be able to accomplish it. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Professor Rowe. On the last point you mean to say, if a party from Massachusetts sues a party from New York and a party from England, that would be excluded under the present application?

Professor ROWE. That particular one would be included. There are about four basic situations.

Mr. KASTENMEIER. You state that those are incomplete diversity, or Federal alienage, I should say.

Professor ROWE. Right. If you have citizens of different States opposing each other and aliens on one side only, that case is within the Federal alienage jurisdiction. But if you have, say, aliens on both sides and a citizen opposing an alien, that destroys Federal jurisdiction. The case cannot be before a Federal court. Or if you have citizens from the same State and an alien also involved in the case, that destroys Federal jurisdiction.

It's a crazy quilt. And it doesn't have anything to do with what the alienage jurisdiction is supposed to accomplish.

Mr. KASTENMEIER. Thank you.

I first would like to yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman. I will be very brief.

I take it from your statement that you believe the benefits to be derived from abolishing diversity, talking about the ancillary, the less

considered benefits that you perceive, that they are only going to be realized if you totally abolish diversity. Is that right? Rather than just abolishing the in-State plaintiff.

Professor ROWE. Some of them would be achieved in part. If you have fewer diversity cases, you would have, say, fewer citizenship determination problems. So some of the benefits would be achieved in part. Others, where you are talking about, say, the confusing effect of having the diversity jurisdiction and its overlap, or reforms that the diversity jurisdiction bars now, I have a hard time seeing how those effects would be achieved without complete abolition.

Mr. RAILSBACK. And yet, I take it that given your choice, if you were not able to get total abolition, that you would support a limited abolition; is that correct?

Professor ROWE. Oh, yes.

One or two points on the reduction approach. It certainly would reduce the Federal caseload some.

But if you say no home State plaintiffs, then what is often going to happen is that they won't sue in their home State. If they really want to be in Federal court, they will sue in the defendant's home State so that they can qualify for Federal jurisdiction there. Or if they sue in their home State, the defendant would still be able to remove. So you would have a lot of these cases ending up in the Federal courts anyway, only after some more shuffle than otherwise would have taken place.

And so I think that the Congress shouldn't expect too much of the no home State plaintiff approach.

Mr. RAILSBACK. That is all I have, Mr. Chairman.

Mr. KASTENMEIER. It is interesting.

The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I will pass, Mr. Chairman. We have had what little colloquy we need here, and I thank you.

Mr. KASTENMEIER. The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I have had considerable correspondence from members of the bar in my State. And I guess they have taken a stand against this legislation, a strong stand against it. They believe that having the option of using the Federal courts under certain circumstances eliminates to at least a certain extent the hometown-type decision that you can get many times. And also, it eliminates to a certain extent the possibility you get trapped in a jurisdiction where the outcome is fairly much a foregone conclusion.

Case after case has been decided in one direction, and they feel there is not an adequate jurisdiction under those circumstances.

How do you get around that kind of objection?

Professor ROWE. The kinds of points that I have been coming across in the work that I have been doing really don't address that problem. There are many pros and cons to the abolition of the diversity jurisdiction that stand on their own, and have to be weighed on their own. If the Congress believes that there remains a substantial problem of bias against out-of-Staters that the diversity jurisdiction was created at least in part to try to handle, then that could be the kind of reason that might properly still be persuasive in retaining the diversity jurisdiction.

My point is essentially that if there are benefits like that, they come at a higher cost than we had realized. I haven't tried to look into the

question of whether there does survive this kind of bias. And I don't feel qualified to speak on it.

My point is that the work that I have done, I think, provides another weight for the balance on one side without saying that the weights on the other side aren't there.

Mr. MOORHEAD. There is one other consideration that comes up in things of this kind also. And that is that many times, a superior court judge in a smaller jurisdiction has never seen the kind of case that perhaps could be involved and have potential Federal jurisdiction. And you get a much better adjudication of litigation where you have considerable experience in that kind of work. And you quite often lose the quality of justice that you would have.

Professor ROWE. One of the things about the working of the complete diversity rule is that it means that very often people are able to prevent litigants from taking advantage of the Federal forum. The kinds of cases that you speak of might remain before a State court and get inferior consideration if the State court did in fact happen to be inferior.

But the way that the diversity jurisdiction is set up right now, people can often manipulate it if they want to stay in State court and take advantage of the very bias that the diversity jurisdiction was meant to protect against. What you do is, if you can find an in-Stater, someone of your own State, who is a proper codefendant, you simply add that person and that case is stuck in the State court under the way the diversity jurisdiction works right now.

So that the benefits of diversity, such as they are, are often conferred on a rather fluky basis. And there are even ways in which people can so structure their lawsuits as to try and make sure that the out-of-Staters can't take advantage of the benefits of diversity.

Mr. MOORHEAD. I think there is still one more argument. That is why I am concerned.

There is a tremendous diversity in qualifications and standards among the various State courts. And a certain amount of diversity, of course, of the qualifications of Federal judges. But it generally has been assumed that they probably have more experience than the average State judge would. And, for that reason, that expertise should be available under these more difficult cases. And we will lose that opportunity if we make this change.

Professor ROWE. To the extent that there are benefits of the diversity jurisdiction and people are able to take advantage of them, I do not mean to deny they would be lost. Of course there would be some costs in abolishing the diversity jurisdiction. But the benefits diversity affords now are available on a somewhat fluky and manipulable basis.

And the main point of the work I have been doing is that they come at a higher cost than we had realized. To the extent that there are real benefits to it, Congress has to decide whether they are great enough.

Mr. MOORHEAD. I suppose we have one other thing that we should consider in this respect. And that is, in many areas the State courts are so impacted that justice is delayed for many years.

I know at one time, if you wanted a case tried in Los Angeles municipal court, you could forget it, unless it was a criminal case, because only very few and selected cases were going to come to trial. You had to settle out of court.

I suppose that is true in many parts of the country. The Federal courts are less impacted, and you can file much, much more rapidly in many cases.

Professor ROWE. I think that actually varies a good deal from district to district. I have the impression that because of the Federal Speedy Trial Act for criminal cases, at least until we get the new judges in place and working in the Federal system——

Mr. MOORHEAD. They are coming.

Professor ROWE. Right.

That in many Federal courts, the delay now for a civil trial is enormous because of the backlog and priority of criminal cases. This relative degree of congestion is something that varies from time to time and place to place. But I have the impression that in many parts of the Federal system right now in civil cases, it is a very serious problem indeed, and that you might even be able to get to trial faster in State court in some places.

Mr. MOORHEAD. I hope that will be taken care of by the 100-odd new Federal judges that we have.

But I think the thing we have to be very careful of is that we not in any way reduce the overall quality of justice available.

Thank you very much.

Mr. KASTENMEIER. I have a question on that point, as long as it is raised.

Wouldn't you agree that the better way to approach such problems for the States would be for each jurisdiction to improve its own State system with reference to access to justice and speedy disposition of cases, and not to artificially contrive to divert them to other forums?

For example, the Federal court system is congested. It might make as much sense to say, "Let's get them to the International Court of Justice. They are not so busy right now." But that isn't the answer.

The answer is to improve that particular court system.

Professor ROWE. I would agree with you, Congressman. And also, it seems to me that the argument that we should retain diversity because the Federal courts are somewhat better could be even an argument for expanding diversity, for lowering the jurisdictional amount, for overruling the complete diversity rule. If the reason we should keep diversity is that Federal courts are better and people should be able to get into them, why shouldn't we expand diversity jurisdiction so even more people can get into Federal court? Yet I have the impression that Congress is not inclined to do that.

Also, one of the things that a good many people think would happen is that with the diversion of these cases to the State courts, more of the energies of the bar would be directed to improvements in the State courts. I have seen some research lately that indicates that there has been such an effect with regard to class actions. There were some very restrictive Supreme Court decisions on class actions in the Federal courts. And apparently, as a result there has been considerable improvement in State class action rules and practices.

People often think it is a wishful response to say, "Well, if you send the cases to the State courts, they will get better." There is some indication that in fact they would. And of course, there has been a good deal of improvement in them already.

Mr. KASTENMEIER. I yield to the gentleman from North Carolina.

Mr. GUDGER. Mr. Chairman, I will ask only one question of Mr. Rowe. Of course, he is familiar with the single court of justice system in the State of North Carolina where he teaches, and the fact that North Carolina fairly recently has adopted the Federal Code of Civil Procedure.

Now, in those States which have not adopted the code, the long-arm processes to bring in nonresidents can sometimes present a problem as they did in North Carolina before we moved in the direction of the Federal Code.

Would you speak to this momentarily? I think it is a further expansion of the observations of the chairman that the States themselves in some instances need to make available to their own courts processes that are authorized now by court decisions, provided their rules of practice and their statutes where rules of practice are not established by their court system authorize the processes for bringing in nonresidents so there can be a total State disposition of a case which perhaps under old practice would have been submitted to the Federal courts because of the further reach of the civil processes under the Federal system.

Professor ROWE. Actually, Congressman, as I understand the setup, the Federal courts, at least in diversity cases, have for the most part, with some very limited exceptions, no greater process than do the State courts in their own State, because the authority of the Federal courts to serve process out of State is borrowed from the long-arm provisions of the State in which they sit.

Mr. GUDGER. You have missed my point. My point is this: That when Federal impleader statutes were available to get a total disposition not in a diversity situation. States now, if they will exercise that authority, can adopt either the Federal rules or statute authority to bring in nonresidents and make a total disposition of a case.

Professor ROWE. Right. The State courts do have now constitutional authority to exercise very broad long-arm process. Nearly all of the States have enacted quite comprehensive long-arm statutes. And I think it is now on the order of two-thirds to three-fourths of the States that have adopted rules of civil procedure based on the Federal Rules of Civil Procedure, which have these kinds of multiple devices that you were referring to. And that means that the State courts can handle those kinds of disputes with rules that are familiar to lawyers from all over the country.

Mr. GUDGER. And does not this speak favorably in reducing Federal jurisdiction and granting and recognizing the ability of the States now to make full disposition of complex litigation?

Professor ROWE. Yes; I think it does. They have responded to this kind of problem by adopting the sorts of rules that are well adapted to deal with it.

Mr. GUDGER. Thank you very much.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman.

Just let me ask an initial question. I listened to the chairman recite your very distinguished career. Have you engaged actively in the practice of law as such?

Professor ROWE. Yes, I have. I practiced law in the District of Columbia for 2½ years before going into teaching.

Mr. SAWYER. Did you do any litigation work?

Professor ROWE. Yes. The firm I was with was mainly a litigation firm.

Mr. SAWYER. Did you do litigation.

Professor ROWE. Yes, I did.

Mr. SAWYER. Did you have principal charge of litigation?

Professor ROWE. No, I did not. I was a junior associate.

Mr. SAWYER. Well, the thing that kind of interests me here is that as I perceive it, the practice in bar is almost universal. At least, as near as I can see, of course, certainly as groups against the abolition. And the Federal judiciary is somewhat split, but naturally probably predominant toward getting rid of the caseload.

While I haven't at length interrogated any State judiciary, I would guess they are probably, for the same reasons, on the other side of the Federal judiciary on the abrogation.

Mr. KASTENMEIER. Would the gentleman yield on that point?

Mr. SAWYER. Yes, sure.

Mr. KASTENMEIER. We will have witnesses here representing the State judiciary. I think they can speak for themselves.

Mr. SAWYER. I know that, Mr. Chairman. I was just making a point.

Mr. KASTENMEIER. In terms of characterizing people's stands, I am not sure that you are being exactly accurate.

Mr. SAWYER. Well, it may not be, except I have talked with the judiciary in my State, and I presumed they would feel the same.

But the fact that the organized bar, the practicing bar as such, is so strongly against it would indicate to me that they are concerned that a substantial benefit to a large number of people is being threatened by the elimination.

Do you put the same weight on that?

Professor ROWE. Well, two things:

One is, I think that lawyers have to be expected to like forum choices. I have talked with a friend of mine who does a lot of litigating in Chicago, and I told him some of the work that I was doing. And he said, "Oh, gee, I hope they don't abolish diversity."

And I said, "Why not?"

He was very frank. "I just like having the forum choice for tactical reasons."

I don't mean to say that is the only reason for concern, but it is part of it.

The other thing is that the work that I have done suggests to me that there would be considerable benefits to the practicing bar that may not have been adequately perceived. Lawyers and judges in this country have gotten used to working with all of the complications of the complete diversity rule. It is something that we learn in law school. We kind of accept it as part of the system. And we don't often spend much time thinking about how much difficulty and purely procedural litigation apart from the merits the diversity jurisdiction causes.

What the effects that I have been talking about indicate to me is that there are some substantial benefits that I am trying to point out that would be benefits for the bar and for their clients. They wouldn't have to pay their lawyers to spend all the time litigating these procedural questions; the lawyers and judges wouldn't have to end up in these complex tangles.

Mr. SAWYER. I am sure there are complexities to the procedural aspects of diversity, but really they impact an exceedingly small percentage of diversity cases. Wouldn't you agree with that?

Professor ROWE. Probably a fairly small percentage, yes. I couldn't say for sure. But particularly when you get into multiparty litigation, I should think that the problems would rise. And that is the kind of situation in which the Federal forum might be most desirable, and yet because of the tangles of the diversity practice, the problems tend to come up the most.

Mr. SAWYER. But I am certain that, for example, you see a lot more of that problem in numbers of appellate decisions than you ever hit down at the trial court level.

Professor ROWE. Oh, agreed.

Mr. SAWYER. And it was represented to us yesterday, that Professor Moore who is short of the Federal practice oracle, is against the elimination of diversity.

Professor ROWE. So I understand.

I think there are two oracles, actually. The other is Prof. Charles Alan Wright of Texas, who originally alined himself with those opposing abolition back in the early sixties. Then in the late sixties, he came to the American Law Institute position for no home State plaintiff and increased jurisdictional amount. And he now is among those supporting outright abolition and has so testified before this subcommittee in the last Congress.

Mr. SAWYER. You did make allusion to the attractiveness of Federal jurisdiction. And I assume you recognize that under many circumstances where it is available, it is attractive—not always, but generally speaking.

Professor ROWE. Certainly. The efforts of people to collude and engage in various tactics to try to take advantage of it are very much indications of that.

Mr. SAWYER. And the thing that is disturbing to me is why now that we have gone to the public expense of adding some maybe 50 judgeships—I haven't counted the total number, but well over 100 in the trial area—and are considering now the expansion of magistrate jurisdiction to further relieve the caseload in the Federal courts, and have expanded the bankruptcy procedures to take the loads off—we should now remove or prohibit something that from a justice point of view obviously is attractive to the American public.

Professor ROWE. Well, one of the points that I think emerges from the work that I have done is that even apart from caseload reduction, these various difficulties which can sound nitpicking, but are, I think, quite significant when litigants run into them, indicate that the federal system of justice could work rather better if it did not have to face these difficulties created by the diversity jurisdiction. There are also other kinds of reforms that would further improve the Federal judicial system that are now stymied by the existence of the diversity jurisdiction.

Mr. SAWYER. Let me discuss just a couple of those.

I am very aware that the Federal court process server is governed by the laws of the State in which it sits, such as the utility or the long-arm statutes and so forth. But what would prevent leaving State service process limitations in place as far as diversity goes, and go to a national servicer process? What is the problem?

Professor ROWE. With regard to national service of process, nothing. And I think it is indeed questionable why the rulemakers didn't do it that way when they rewrote the process rule in the early sixties. There are some other kinds of reforms that I have discussed in my article, things that would be blocked, I think, by the retention of diversity jurisdiction.

Mr. SAWYER. Let's hold it to the national service of process. That isn't in any way impeded by the fact that diversity cases may be under the State process. You can still go ahead and have a national service process for Federal national jurisdictional-type cases.

Professor ROWE. Yes; and the Congress has so provided in a good many individual types of cases. What I have not meant to suggest is that the existence of diversity makes it impossible to adopt uniform national service for other cases.

Historically, though, it was diversity that did prompt the rulemakers not to do it. And my suggestion was simply that one of the things that could happen as a result of abolition would be that it would facilitate things for reconsideration of the question. You don't absolutely have to have abolition.

Mr. SAWYER. As a matter of fact, the abolition of diversity jurisdiction itself would in no way make it easier to adopt a Federal service process for all Federal questions. You can do that with or without diversity existing.

Professor ROWE. For all Federal question cases, Congress could do that right now if it wanted to. What I have been pointing out was simply that when the rulemakers wrote the present rule, they did feel constrained, perhaps wrongly so, but that was an example of an effect that diversity did have on their thinking.

Mr. SAWYER. Now, it was also suggested yesterday, that Federal courts should be relieved of this necessity of staying conversant with changing State decisional law and statutory law. But they still would have to do that because of pending jurisdiction anyway, wouldn't they?

Professor ROWE. They would have to do it some. They would have to do it a good deal less, because there would simply be many fewer cases in which the Federal courts would be called on to interpret and apply State law. Of course, when a State law question comes up in a case before a Federal court within a Federal question jurisdiction, the Federal courts have authority to go ahead and decide it and often must do so.

The point is not that all State law determinations would be removed from the Federal courts, but rather that there would be many fewer situations in which the Federal courts would be called on to make those determinations, and that that is a positive thing, because the Federal courts do not have the real authority to say what the State law is. There is a nice quotation from Judge Friendly, who also supports the abolition of diversity, on some of the problems that the Federal courts face. They are kind of like ventriloquists' dummies for the State courts. He once said in some complicated case, "Our principal task in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." That is the kind of situation that the Federal courts now get into with some frequency because of the existence

of diversity questions and the State law determinations involved in them. Of course, they would not all disappear. It is just that there would be rather less. And the State courts do have the proper authority to determine authoritatively what the State law is.

Mr. SAWYER. They still have to do that in the pending jurisdiction case?

Professor ROWE. Yes, it would still arise, but much less.

Mr. SAWYER. In the airlines cases you point out its true diversity doesn't completely eliminate multiplicity of suits because of identity of citizenship in some of the potential plaintiffs with a potential defendant, but it does reduce it. It doesn't increase it.

Professor ROWE. There are some situations, perhaps not the airline cases, in which—

Mr. SAWYER. I mean you used the airline cases as an example, and in those cases it would tend to decrease the multiplicity as opposed to multiplying.

Professor ROWE. Well, what it does is it adds another layer of courts, the Federal courts, in which these suits can be brought. Those that are brought in Federal court can be consolidated for pretrial proceedings, but under present law often not for trial. What quite often does happen in these multistate situations is that the existence of diversity jurisdiction sends into the Federal system part of the case that would otherwise have been tried entirely in the State system.

Mr. SAWYER. I wonder if I could just take another minute or two. Is that permissible, Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. SAWYER. A couple of things really are bothering me about elimination of diversity. One is the problem in most, if not all, States of areas wherein you get exceedingly rural juries in a particular jurisdiction, which, while it may not be so in all cases in general, behave somewhat differently than urban or more urban juries as such.

Do you see that as a problem if we eliminate diversity?

Professor ROWE. To the extent that problem exists, yes, there would be somewhat more of it as a result of the abolition of diversity. One thing is, of course, that today that problem often is not so much a problem of interstate prejudice, but simply of prejudice against urban folk if you get into a rural situation. The person from Atlanta may have to worry as much in front of a jury in rural Georgia as does the person from New York.

Mr. KASTENMEIER. If the gentleman would yield on that question: To use a hypothetical my friend from Michigan used yesterday, the plaintiff is suing the Gerber Company in a small, relatively rural county in Michigan, and that plaintiff comes from Detroit. That plaintiff is not better off than the plaintiff who comes from Toledo, yet apparently the plaintiff who comes from Toledo can seek a Federal forum, but the plaintiff from Detroit cannot. The plaintiff from Detroit still has to go sue the Gerber Company in your county.

And to this extent justice apparently is not done.

Mr. SAWYER. It isn't a cure-all, but I don't think you cure a problem by adding to it, and you wouldn't just put the people in Detroit in that situation. You put the people in the other 49 States in the same situation.

Mr. RAILSBACK. Harold, would you yield?

Mr. SAWYER. Yes.

Mr. RAILSBACK. I guess in raising your concern, what bothers me is that in a rural area, if you do not have diversity of citizenship, then in that case, say, you have a plaintiff suing a corporation, then you really don't have the luxury of going into the additional forum. So in other words, it seems to me in that particular case, that diversity is providing a luxury where you happen to have the circumstance of somebody from out of State.

Mr. SAWYER. I don't know whether I would agree it is a luxury. It is a question of it might also be a necessity. But because it doesn't solve all problems, you are throwing everybody else into the same problem, which is hardly the way to cure a problem.

And I really—unfairly really, and only by way of example—pick that Gerber Products Co. case because my firm happened to be counsel for them, and they are very nice people.

But on the other hand—and I am sure this is very true around the country—that whole county is substantially a one-industry county. It is an exceedingly rural county. The little city of Fremont, which may be a 10,000 population city and a very nice city, is supported both directly and indirectly by Gerber.

You have Gerber Memorial Products and whatnot, and it is the only industry. They aren't really in that. There are literally hundreds and hundreds of counties around the country that that is true.

While I would doubt that, if you sued Gerber for an automobile accident in Baraga County in Michigan, you wouldn't get decent justice from an Iowa jury; that is, if you were an Iowa corporation bringing a contract action. That might actually be of severity enough to severely damage or prejudice Gerber. You would not want to be in a Baraga County jury situation.

And those, I'm sure, are problems. And I just wonder what your view of those would be.

Professor ROWE. There are some such problems. I am not sure how extensive they are. The Congress would have to decide that that price was worth paying if it were to abolish diversity. The problems already do arise, though, in situations in which the plaintiff simply happens to be a Detroit corporation rather than a Toledo corporation.

Also, one of the things that I think I pointed out a bit earlier is that the availability of the diversity jurisdiction can be subject to manipulation. For example, I think it was back in the sixties when there were some famous libel suits against the New York Times in Alabama or some other Southern States for reporting on some civil rights activities. The local plaintiffs would join a local distributor, or something like that, of the New York Times to make sure that the case stayed in the State court. In other words, the diversity jurisdiction, because of the complete diversity rule, is subject to manipulation.

Mr. SAWYER. I understand that. I appreciate it is not a cure-all, and it has its faults. The problem I'm concerned about is are we adding to a problem by abolishing it, as opposed to it being a cure-all?

But just one or two other things. There are some States, and I realize here now a minority, that don't have modern procedural codes in the sense that they have virtually unlimited discovery availability and pretrial, and various things at least are perceived as an improvement,

and in those States, of course, you are depriving out-of-staters coming in from access to, let's say, modern, what are considered to be, good procedural rules.

Professor ROWE. Yes. They do need to have those kinds of procedural facilities, general discovery, interstate discovery and so on. But a party's need for those facilities doesn't necessarily have anything to do with whether the party happens to be able to take advantage of Federal diversity jurisdiction. The reasons why people are excluded from Federal diversity jurisdiction certainly don't mean that they don't need the same sort of procedural devices.

I think that we do have some examples of how the exclusion of these cases from the Federal system would likely contribute to some reform in—

Mr. SAWYER. For your information, that is a beeper to tell us there is a vote.

Mr. KASTENMEIER. There is a quorum call on presently. You may continue.

Professor ROWE. The abolition of diversity might well contribute to reform, so that everybody, not just those now able to take advantage of Federal jurisdictions, would have access to those facilities.

Mr. SAWYER. Except I think maybe it is going a little far to think that the State people don't do it for themselves. They are likely now to suddenly do it because some outsiders are involved.

But just one other thing, and that is the general accessibility, just from an out-of-State person's point of view, most Federal courts are located in pretty accessible places of most all States. So you can fly in to see to the court formality, where that purely isn't true if you are relegated to State courts in general, particularly out of the main urban areas.

Professor ROWE. Since State courts do exist in every county, there would be some cases brought in out-of-the-way places, certainly.

The point that I have been trying to make is not to deny the reality of any present benefits of diversity, not to deny that there would be costs associated with abolishing diversity. There is room for debate about how great they are, whether they would be worth incurring.

The main point that emerges from what I have done is, I think, that the benefits we now enjoy from diversity are benefits that come at an even greater cost in other ways than had been generally realized. I am not at all trying to deny the reality of the kinds of present benefits that you are rightly concerned with. What I am trying to suggest is that there is an additional major set of considerations that does weigh on the other side. How much it should weigh is, of course, a matter for your judgment.

Mr. SAWYER. Thank you.

Thank you, Mr. Chairman. That's all I have.

Mr. KASTENMEIER. The gentleman from California.

Mr. MATSUI. I have no questions, Mr. Chairman.

Mr. KASTENMEIER. Fine. I must say the gentleman from California, Mr. Matsui, has been very patient. We will start with him on questioning on the next round, if we have the opportunity.

I want to thank you for your contribution this morning, Professor Rowe. Obviously, you have introduced some matters which have not been introduced into the debate before. And it has been very, very helpful.

I will say this for the committee. There is a quorum call on. We will proceed through quorums, but, of course, we will recess for rollcalls.

We have two more important sets of witnesses—Mr. Begam for the Association of Trial Lawyers is next. Then we have two supreme court chief justices with us, our last panel this morning.

And I will implore you to return promptly if you do leave for the quorum or for any other purpose.

Mr. DANIELSON. Mr. Chairman, I am going to leave for the quorum. I will return promptly.

And I am going to recommend we adhere to the 5-minute rule, because we will never be able to hear our witnesses otherwise. My good friend Harold down there knows I am taking a little oblique shot at him, but it is all done in good spirits.

Mr. SAWYER. I didn't perceive it at all.

Mr. DANIELSON. We will never get done unless we discipline ourselves.

Mr. KASTENMEIER. Let me ask how many members are leaving for the quorum call. If it is just one or two—well, I think we will, in that event, recess for 10 minutes. And I urge everybody to return for our next witness.

Accordingly, the committee stands in recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. I would like to call the committee to order. I do this because we have witnesses who have other obligations, time obligations, and to permit us to complete the hearing of the testimony, we must convene. Our other colleagues will join us shortly.

At this point it is a pleasure for me to greet back a witness who was here during the last Congress and who testified on this subject. He is very knowledgeable and brings to the committee the views of not only himself but that of his association with regard to a particular area of expertise.

I would like to greet Robert Begam, past president of the Association of Trial Lawyers of America (ATLA). He practices law in Phoenix, Ariz., and has been here before. So I am pleased to greet him back this morning. And you may proceed as you wish.

I note, Mr. Begam, the statement of the association, which is 23 pages plus an attachment, which I will be pleased to receive for the record.

TESTIMONY OF ROBERT G. BEGAM, PAST PRESIDENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. BEGAM. Thank you very much, Mr. Chairman. In view of the fact that the Chief Justice who follows me is my Chief Justice and has already identified his time problem, you can be assured I will be short, particularly since there is a threat of abolishing diversity jurisdiction, which would force me to practice more before my Chief Justice.

As the Chair notices, I am a practicing trial lawyer in Phoenix, but I do appear here today for the Association of Trial Lawyers of America, a national bar association with affiliate organizations in all 50 States. We currently have over 34,000 members, including judges and law teachers interested in improving the litigation and judicial process.

Mr. KASTENMEIER. Mr. Begam, forgive me. I now understand why there are only three of us here. There is a vote on the floor at this

moment. We are going to have to make that vote, in any event, so I think we will have to recess here at this point in time, return to the floor, hopefully to be joined in return by our other colleagues. And we will resume with you just where we were.

The committee will stand adjourned for, hopefully, 6 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order after a short recess.

I apologize to our witnesses, particularly the witness before us, Mr. Begam, who had just started to proceed. I'm sure our colleagues will join us. You may continue.

Mr. BEGAM. Thank you, Mr. Chairman.

I was speaking about our association briefly. And I did want to make the point our trial lawyer members for the most part represent injured individuals and consumers rather than major corporate and insurance industry interests. And since our clients are accident victims, plaintiffs, if you will, it goes without saying that we and our clients are the last segment of the American population who would be indifferent to delay or court congestion. We are rightly concerned.

If that was the only issue before us in the diversity conflict, we would be out front in doing everything reasonably available to the bar, and the bench, and the Congress to reduce congestion. But we don't think that on balance there is enough to be gained. We do think there is a great deal to be lost.

Let me be quite specific on that point, on the loss to be suffered by American citizens should diversity be abolished. Let me talk for a moment about those citizens who live in the most congested jurisdictions who would suffer, who do suffer, most from delays in delivery of justice at the present time.

Let me talk about Boston, about Philadelphia, about New York, about Chicago. We are hampered a bit by not having current statistics, but we did do a statistical analysis in preparation for the hearings last year, and I am confident that the congestion figures are, if anything, a little worse, not better now, than they were last year, although we don't have this year's figures.

But the most recent figures that are available, or at least that I have seen, indicate, for example, that in Boston the delay from time of filing to time of trial in the State courts is 42 months. In the State court of Philadelphia it is 47 months. In the Borough of Manhattan it is 46 months. In the Borough of Brooklyn it is 35 months. In the city of Chicago it is 37 months.

If Boston litigants have the diversity option available, they can get to trial in Federal court 8 months sooner, a slight benefit. Their counterparts in Philadelphia can get to trial 20 months sooner. In Manhattan, Brooklyn, and Chicago the contrast is more dramatic. In Manhattan the delay on the State side is 46 months and only 21 months on the Federal side. In Brooklyn the delay on the State side is 35 months and only 18 months on the Federal side.

In Chicago, the most dramatic of all, on the State side the delay is 37 months, and in the Federal court only 11 months. If we strike an average of those five major examples of congested urban jurisdictions, you will find that on average on the State side the delay is 42 months, whereas on the Federal side it is only 21 months.

You cut the delay essentially in half on the Federal side. Now, those are not examples that are not meaningful, because if you analyze the tables provided by the administrative office of the U.S. courts, you will find that those five jurisdictions I have been talking about, Manhattan, Brooklyn, Boston, Chicago, and Philadelphia—have 5,639 of the 31,000 diversity cases, about 18 percent of what would be kicked out of court by abolishing diversity jurisdiction.

What is the punchline? Well, if this bill is passed, we would be telling thousands upon thousands of American citizens to wait twice as long as before to have their suits heard, when it was already taking too long. Every practicing trial lawyer in the United States knows what the comparative figures are in his jurisdiction.

The irony of my testifying on this subject is, as some of the committee members remember, when I testified last year, I pointed out that in Arizona we have the reverse situation. We have a very, very congested Federal calendar and a State calendar that, while it can't be described as current, is much more current than the Federal calendar. We can get to trial a lot quicker in State court than we can in Federal court.

But if you look again at the statistics given to us by the administrator's office, you will find that Arizona is among the very few States that has an 80-percent criminal caseload. Our Federal judges expend 80 percent of their time with dope cases, illegal entry cases, stolen car cases, the like, and only a very small part of their time handling civil matters at all.

So abolishing diversity jurisdiction is not going to help us in Arizona. Abolishing diversity jurisdiction is going to hurt those who live in congested urban areas who are suffering the most from the very problem that this committee is addressing, and that is delayed justice.

I would suggest that, since every trial lawyer in the United States does know what the situation is in his jurisdiction, he also knows the value of the alternate courtrooms, and I think that that is unquestionably why not only does the Association of Trial Lawyers of America but the entire organized bar, including the American Bar Association and the State bar association of 37 States, oppose this legislation.

And we have appended a list of those 37 State bars who have passed resolutions to our written statement, and I would request that that also be inserted in the record.

MR. KASTENMEIER. Without objection, the entire statement and the attachment suggesting the State bar associations in opposition will be made a part of the record.

[The statement of the Association of Trial Lawyers of America follows:]

STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA ON THE SUBJECT OF DIVERSITY OF CITIZENSHIP JURISDICTION OF THE U.S. DISTRICT COURTS

My name is Robert G. Begam and I am a practicing trial lawyer in Phoenix, Arizona. I appear before the Subcommittee today on behalf of the Association of Trial Lawyers of America, of which I am a past president.

ATLA is a national bar association with over 34,000 members, consisting not only of practicing trial lawyers but judges and teachers, as well, who are interested in improving the litigation and dispute-resolving process in this country. Trial lawyer members, for the most part, represent individuals who are

injured and who are consumers, rather than corporate and insurance company interests.

Let me say at the outset that it is a great privilege for me to be testifying before the Subcommittee and to be speaking for the trial bar in this particular matter. Since our clients are, for the most part, plaintiffs in litigation, it goes without saying, I hope, that our particular clients and my particular constituents are the last segment of the American population who would be indifferent to problems caused by court congestion and delay in getting to trial, in State or Federal court. We and our clients cannot profit by delay.

It is against this background that ATLA welcomes the interest demonstrated by this Subcommittee, your parent Judiciary Committee, your sister Committees in the Senate, and the entire Congress in searching for solutions to the overload, to the extent to which it exists, in the Federal court system. We particularly appreciate the renewal of your inquiry into whether the abolition of diversity of citizenship jurisdiction of Federal courts is an appropriate or advisable step to take. This renewed inquiry demonstrates a recognition on your part that this is a serious step indeed, a step to be taken only after hard evidence has been adduced sufficient to prove that a system which has served us well for 200 years must now be scuttled. The burden of proof imposed on those who would abolish diversity jurisdiction is enormous and it is, in fact, theirs. The drive for abolition can become habit-forming, inexorably pushing itself forward irrespective of major changes in the environment which led to its rise. ATLA congratulates this Subcommittee for its willingness to cautiously collect, weigh and re-examine all the evidence and premises on which the habit of seeking the abolition of diversity could otherwise be built.

THE AMERICAN SYSTEM OF JUSTICE

Plato tells us that the measure of a civilization is the system it devises for resolving human conflicts. If Plato was right, and we think he was, the civilized society which we have created in the United States measures up very well indeed. Without question, we have the most comprehensive system of justice which human history has ever evolved—a complex of fact-finding and law-interpreting bodies, administrative and judicial, public and private. On the public-judicial side we have city, county, State, and Federal court systems, providing our citizens with not only an appropriate forum for dispute resolution but, in many instances, with a choice of forums as well. This, we submit, is good and essential to the grand design of the system of justice which we have devised and refined over the last two centuries.

The basic function of government is to serve the people with respect to those societal functions that cannot be provided as effectively by the private sector. Basic among the various governmental services is the court system. And one of the most basic services provided by the Federal government is the Federal judicial system. To the extent to which it has co-existed with State judicial systems it has always been an alternative rather than a primary or sub-system of justice. It is in the very offering of an alternative—an option as to dispute resolution—that we believe the Federal government is providing its citizens with a social service of unquestionable legitimacy.

Diversity of citizenship jurisdiction in the Federal courts is the key to the alternative system. Abolish it and you destroy the choice on which so many rights so often rely. The Federal courts have had diversity jurisdiction since 1789. They were given this power to become a parallel, supplementary system because it was recognized by the first Congress that there was a strong possibility of prejudice in the courts of one State against out-of-State litigants. Congress very early on recognized that prejudice was reflected in the quality of justice dispensed by the State courts. This perception—that prejudice may exist against litigants from out of State—is still valid and is still justification for providing a choice of forums. Diversity jurisdiction has steadily outgrown its original justification to the point where its continued existence is vital whether or not this prejudice continues.

In the 95th Congress, this Subcommittee and the Senate Judiciary Subcommittee on Improvements in Judicial Machinery took up the question of the abolition of diversity jurisdiction for the first time since 1971. Much of the testimony in the 1977-78 hearings focused on the existence of delays and backlogs in the Federal courts. Comparatively little testimony, it is fair to say, explored the parallel circumstances of the State court system. Yet, on the basis of this incomplete record and on the basis of some bald assertions to the effect

that the State courts could handle it, it was proposed and accepted by many that the alternative Federal forum should be destroyed in the name of "judicial efficiency."

We submit that the blind advocacy of "judicial efficiency," so vogueish in this and other contemporary legal debates, must be put in perspective. Court congestion is certainly not a virtue, but it may well be symptomatic of a virtue—the virtue of a calm, deliberative, and thorough legal system which values the protection of human rights above all else.

The characterization of the Federal courts as overcrowded is freely made, especially by the Federal bench and by those Federal court parties who see diversity cases as "second-class" litigation presenting a barrier to their "first-class" causes of action. This characterization can lead to oversimplistic responses and remedies. Chief Justice of the United States Warren E. Burger has time and time again maintained that the Federal courts are inefficient and jam-packed. His remedy, proposed and imposed, is to totally deny certain litigants access to the Federal arena of justice. This approach of closing the courthouse door, if carried to its extreme, either through further court rulings or through legislation such as H.R. 2202, carries with it the seeds of the destruction of the American system of justice as it has evolved over 200 years, all in the drive for efficiency. A noted consumer advocate and columnist has written: "The courts must grow and adjust to people's need to use them; people's rights should not be compromised or restricted in order to adjust to the courts' problems. Never should meritorious laws or legislation be conditioned by any predicted added use. The two are separate problems to be considered separately."

THE BURDEN ON THE FEDERAL COURT SYSTEM

This Subcommittee has heard, over the past two years, a litany of testimony by respected Federal jurists on how the Federal courts are about to burst with cases. This certainly cannot be denied for many of the 94 districts, especially in the urban centers. The story, however, is not one-sided. For example, one Federal judge, in a statement given during the last Congress to another Subcommittee of the House Judiciary Committee, on the subject of the need to split his circuit and create additional judges, had this to say about the burdens on the Federal bench:

"Item.—'Judges are overworked.' I do not think so. I know none who has a taste for golf or foreign tours who has had to give up either one. . . . My tastes happen to run to hunting and fishing and I have bagged more game and strung more fish in the four years I've been on the bench than in my 20 years in the practice of law. I work about a 40-hour week, occasionally coming in to check the mail on Saturdays, and less frequently take some work home to do in the evenings. I am absolutely current and have no delinquent matters to my charge."

To be sure, some courts are crowded and, to be sure, delays exist. But the underlying cause of congestion and postponements must be individually and calmly examined. More information is required than just the bare facts of how many of the Federal civil cases are diversity cases, what percentage go to trial, and how long they take to try. Old, but threshold, questions such as the true impact of these cases on the also-overburdened State courts in urban centers have yet to be addressed. Most importantly, however, major legislative changes in the judicial workplace must be analyzed. These changes, both enacted and likely to be enacted, carry with them a collective impact on the level of the burden placed on the Federal courts. This impact is potentially of such significant dimensions that it could render obsolete judgments made as recently as one year ago.

The most significant of these legislative measures is, of course, the additional judgeships bill. ATLA testified in 1977-78 that it would not engage in blindly oversimplifying our position by saying, "All we really need is more judges." The fact cannot be ignored, however, that 117 new Federal trial judges will make a substantial dent in the existing burden. Further, even given the exigencies of the political process, it is likely that most of these new judgeships were placed, after careful analysis, where they were needed. This approach to the burdens of the Federal courts denies no rights and attacks the problem where it exists. It is, for that reason, a thoroughly acceptable solution and ATLA applauds the Congress for it.

Another acceptable approach to solving the Federal courts' condition lies in analyzing the burdens placed on the courts to determine whether one particular type of case is creating specialized problems which can be solved with specialized

treatment—the scalpel rather than the cleaver. The 95th Congress also acquitted itself well in that approach, with its reform of the procedures by which Federal courts handle bankruptcy and reorganization cases. This reform alone provides so much relief to the Federal courts that it changes the picture entirely. Another example of this specialized approach can be seen in the Antitrust Procedures Improvement Act, now under active consideration on the Senate side. This carries potential for unclogging many of our urban, commercial law-oriented Federal trial courts, again without a sweeping denial of rights.

ATLA encourages the Congress to continue to search for fair and evenhanded methods and procedures for combatting delay and congestion, both in the Federal and the State courts.

We support the Magistrates bill. We would support a system of an increased jurisdictional amount in diversity cases, if the magistrates system could take care of the smaller cases adequately. We think it could; the two could go hand in hand.

We have been on record for years as supporting arbitration across the board in smaller civil cases in the areas of medical malpractice and product liability, as opposed to other more complicated civil litigation matters.

We have urged for years the improvement of mandatory pretrial conferences, the idea of mandatory settlement conferences, and other procedural methods of handling the delay problem. Other proposals which promise a salutary effect on the burdens of the Federal courts are also under consideration—perhaps by this very Subcommittee—proposals such as re-evaluating those Congressional enactments which require that causes of action created therein be given priority treatment by the courts, as well as proposals changing discovery procedures and all the other concepts endorsed by the Justice Department aimed at improving judicial efficiency.

The fact is, simply stated, that legislation has already been approved, reducing the burden of the Federal courts, and this burden stands to be further lessened by future Congressional enactment, without the drastic encroachment on human and legal rights represented by the instant bill. To those who said, last year, that they understood our position but felt that the need to relieve the Federal courts of some of their burden was paramount, we say that the whole burden issue has to be re-examined.

Fortunately, it appears that the mechanism for this type of study will soon be in place. Chief Justice Burger has long advocated the requirement that any new judicial legislation be accompanied by a "judicial impact statement." ATLA disagrees with the idea that resources are so tight that justice must be so closely rationed. However, if the Chief Justice and the Congress think that that is the case, ATLA must welcome a plan which will provide some hard information with which to make those judgments. Until now we have noticed a tendency on the part of many who advocate reform of our courts, and especially our tort system, to make decisions in the pursuit of judicial efficiency, with a lack of concern for facts that is matched only by an indifference to the rights of plaintiffs.

On October 3, 1978, the Department of Justice announced that it had awarded a contract to a Bethesda, Maryland firm to develop techniques for measuring, in advance, the impact of legislation on the justice system. The firm, according to the DOJ, will work closely with Congressional Committees, the Administrative Office of the U.S. Courts, and the Federal Judicial Center. In announcing the contract, Attorney General Bell said: "We feel this program will fill a great need. In the past, the Executive Branch often has proposed legislation and Congress then has acted upon it without anyone having a full understanding of its potential impact."

The judicial impact statements, once the technique is developed, will deal with legislation intended to conserve existing judicial resources, as well as with legislation requiring new judicial responsibilities.

ATLA suggests that all the legislation mentioned above, both enacted and proposed, and any other idea developed to restrict Federal judicial resources, be made the subject of the very first judicial impact inquiries. Only after these comparisons are made will the decisions to abolish 200-year-old rights, if based upon arithmetic calculation, be done with some semblance of logic. Certainly, reform of the system can wait until the complete figures are compiled.

THE BURDEN ON THE STATE COURT SYSTEM

The question arises: "Can the State courts handle all these diversity cases?" The question goes both to the number of cases and to the nature of the cases.

In the 95th Congress, there was a troubling tendency on the part of the abolitionists to accept unquestioningly the rather bald statement by the Conference of Chief Justices that the State court systems are "able and willing" to assume all or part of the diversity jurisdiction presently exercised by the Federal courts. This position, we are told, was adopted by Conference resolution "without dissident."

It would be presumptuous of ATLA to look behind that resolution to examine the degree to which the statistics in question were explored and debated, and by whom. Two observations can be made, however: (1) the sweeping generality of the statement, taking in all 50 states in one brave "can do," belies the lack of statistical thought given it; and (2) what else could the Conference be expected to say?

The State courts are emerging as an organized political body. They have moved to impressive new quarters closer to Washington and have begun to take on staff and projects, all of which is commendable, in dramatic numbers. The point is, the Conference is in neither the position nor the state of mind to shrink from any challenge at this point; and shrink, it has not. Indeed, the chief spokesman for the Conference in this area of Federal-State Relations has said that he wants the diversity cases turned over to the States without regard to whether the Federal courts are burdened by them at all. (He also advocates the return of Federal question cases to the State courts.) At least other abolitionists claim to understand, and even sympathize with, the value which injured plaintiffs put on the choice of going to Federal court; the choice must be revoked, they say, to ease the burden on the Federal bench and other Federal litigants. But such is not the rationale of the Conference of Chief Justices, it seems.

ATLA wishes it could refer the Subcommittee to as much testimony from State trial judges as often the proponents of abolition refer to the testimony by Federal judges and State Supreme Court Chief Justices or Administrators. The sad fact is that the record is incomplete in this regard, since the opinion of state trial judges on whether there is room on the trial calendars for diversity cases is, up to now, unavailable. Again, the bare assertion by the Conference of Chief Justices satisfied the proponents. I personally do not know of a State trial judge who is prepared to embrace the diversity cases with any degree of enthusiasm.

We do not know what the actual impact of transferring the diversity cases will be. At the time the House of Representatives was asked to suspend the rules and pass the abolition bill last year, there was little in the record of this Subcommittee's hearings which offered any guidance on this question. The evidence consisted primarily of the long division showing that the number of diversity cases divided by the number of State trial judges yielded an apparently reasonable quotient.

The "average case load" approach completely ignores not only the differences between States but the differences within each State as well. Everyone knows that litigation tends to cluster around the urban centers. Urban center cases tend to be more complex. Urban center State courts tend to be just as crowded, if not more crowded, than Federal courts which are, by and large, also in the urban centers. Yet, even a month after the House had passed H.R. 9622, the Conference of Chief Justices was admitting to the Senate Subcommittee that it was unaware of any statistics which would show exactly which State courts, standing by "ready, willing, and able," could expect to receive the new cases.

Incidentally, and this returns to the previous point about the utility of judicial impact statements for proposed legislation, it should be noted that every dollar saved by the Federal government in abolishing diversity jurisdiction would not necessarily be a dollar earned. The Conference of Chief Justices has repeatedly stated that the State courts will require ample Federal funds to permit them to be "ready and able" to handle these cases. (The willingness, while questionable at the trial level, appears to be free.) The Conference insists that the funds should have no strings attached, lest the independence and integrity of the State court system be compromised.

Since the Senate hearings, the National Center for State Courts has published a study, in the Summer 1978 issue of State Court Journal, entitled "The Relative Impact of Diversity Cases on State Trial Courts." In that study, it is revealed that some twenty States would suffer a disproportionately high impact from the new cases. Seven States, it is reported, would be affected to the point where new judgeships would be required. Although the authors do generally endorse the Conference of Chief Justices' conclusion that the diversity cases "could be handled in most instances without major additions to state judicial resources," they

also call for further studies, emphasizing the need for refinement of the analysis of the impact within each State, where the urban "cluster" problem will play such a determinative role.

We are, then, left with the long division, now revealingly broken down by State, but still with no grounds on which to reasonably anticipate the impact within each State.

It is the strong recommendation of ATLA that if the proponents of abolition are interested in statistical analysis in deciding whether to revoke age-old rights, then this Subcommittee is in a unique position to gather and carefully weigh those statistics. To ask the full Committee and the House of Representatives to abolish diversity jurisdiction on a less complete basis would run counter to this Subcommittee's usual record for thoroughness.

THE JUSTICE FACTORS

ATLA's opposition to abolishing diversity jurisdiction does not rely on the question of whether the diversity cases are too much for either the Federal or the State courts to handle. Early in this statement we make reference to the unique system of American justice which offers the choice of forum to those who need it. Trial lawyers value this choice for their clients for a number of reasons.

Diversity jurisdiction was created, we understand, to permit out-of-State litigants to avoid discrimination founded upon in-State bias or prejudice. I submit that, despite what you have been assured by some with a sophisticated, multi-State, urban practice, that prejudice lives on, and strongly. A U.S. district court judge from the Western District of Texas, writes: "It is still my opinion that a Brooklyn Yankee driving a Cadillac automobile who has a serious automobile accident with a Boerne farmer of German descent who is driving a pick-up truck cannot expect a fair trial in Comal County (and I can say this from actual experience) whether he be a plaintiff or a defendant."

Everyone who has tried diversity-type cases can draw on his experience for similar examples. One problem, of course, is the difficulty in isolating the home-State prejudice from other prejudices which may be subscribed to by those in the locale of the court. Take the above example. Was the Comal County jury anti-Yankee or just anti-Cadillac, pro-pick-up, or maybe even anti-non-German descent? When a Harlem-born doctor sues the sheriff's son in rural State court in Alabama, are his chances of getting a fair hearing diminished because he is from New York, because he is black, because he is a doctor?

Diversity jurisdiction has evolved to the point where it now offers its protection to those who might otherwise suffer from many kinds of prejudice. It is true, as has been pointed out in statements opposing the position of ATLA, that these protections are available only to those litigants "fortunate" enough to be involved in cases with the requisite diversity of citizenship. What this means is that litigants not so fortunate do not have the same protections and thus may suffer an injustice. Is the solution to this the ripping away of the option from those who have it in order to create equal injustice? I think not.

Fortunately, these "justice" factors do not press in large volume on in-State plaintiffs, so preserving diversity for in-State plaintiffs will not have a heavy impact on case load: but they recur often enough to deserve consideration. Last year, when I testified on this subject, I proffered three examples of cases where diversity could protect against prejudice based on something other than the State from which the plaintiff hails. I was disappointed that no other witness addressed these examples because I think it is important that those who would deprive these plaintiffs of these protections understand exactly what they are doing. I again offer the examples for comment:

(1) A Navajo couple is killed in a highway accident in northern Arizona with an interstate tractor-trailer registered in Texas. Three minor children survive. They have the choice, now, between a State court action in Holbrook, Ariz., with an all-white rural jury, and a Federal jury action in Phoenix.

(2) A student at Northern Arizona University has established residence in Flagstaff to participate in local political affairs. He loses an eye when a beer bottle manufactured by a Colorado company explodes. His choice is between a Flagstaff jury before whom he has a controversial reputation, a jury not overly sympathetic to college lads anyway, and a Federal jury in Phoenix.

(3) There are, in Arizona, surviving relatives of eight people killed in the KLM-Pan Am crash in Tenerife, Canary Islands. Under present law

they can sue in Federal court in Arizona and obtain the benefits of consolidation under multidistrict complex litigation rules. If deprived of the diversity option, they would have to try an isolated State court action, or go to Federal court in New York to file suit, with significant extra expense and legal fees.

The above examples are taken from my actual experience, one trial lawyer practicing in Arizona. I am confident that all active practitioners who oppose limiting diversity could provide the Subcommittee with similar examples.

Delay is another factor to be considered. It certainly appears to be the primary concern stressed by the proponents of this legislation.

In some jurisdictions, such as my State of Arizona, there is now more delay on the Federal than on the State side. This is a relatively recent development. In 1971, when extensive hearings were conducted in the Senate on this subject, the opposite was true. In other States there was then and still is considerably more delay in State courts than Federal. Given a choice of forums, there is a natural tendency for a plaintiff to stand in a shorter line, absent some countervailing consideration of profound impact. An Arizona plaintiff seeking redress for a wrong is not likely to wait 3 or 4 years for a Federal trial when he can get to court in 12-16 months in State court, unless he would be seriously prejudiced in the available State courthouse by other factors.

So, with the present "choice of forum" system, differences in delay time between State and Federal courts tend to be self-adjusting. History demonstrates that these differences are cyclical. Ten years ago in Arizona, by way of example, plaintiffs chose Federal court whenever possible because there was less congestion. This movement to the Federal courts, along with an exploding criminal load and the failure to provide an adequate number of judges, has converted Federal courts in Phoenix from current to congested. Plaintiffs now invariably choose State courts because they are faster.

There are other justice factors, to be sure. The mix of jurors in Federal court is generally the same as that in urban State courts but vastly superior to that in rural State courts. The whole balancing process of the jury deliberations is lost when everyone on the jury has similar background, training, and outlook. Not every State is as ready as Arizona to embrace the progressive Federal Rules of Evidence and Procedure. There is substantial opinion that the State courts have a long way to go before they can tackle the complex multi-state litigation which is handled so well by the Federal system. This is not to denigrate any State or State court system. The fact simply exists that the Federal courts can sometimes offer protections to those who need them which the State courts cannot.

THE DANGERS OF AN OVERSPECIALIZED FEDERAL BAR

Another reason for trial bar opposition may be overlooked by non-practitioners. We trial lawyers see each other all the time in both State and Federal court. Quite clearly, a drastic reduction of diversity cases would lead to a Federal specialty bar. This would be regrettable. In most States, as a practical matter, both the Federal and State systems have benefitted from the free circulation of lawyers and legal ideas between the two. In my State, Arizona, a State which has always been the first in the Nation to adopt Federal rules, there has always been productive cross-fertilization with respect to desirable procedural practices. This is because the trial bar in Arizona practices meaningful and regularly on both sides. Limiting diversity jurisdiction would isolate the Federal bar and damage the healthy exchange which presently exists.

OPPOSITION TO ABOLITION OF DIVERSITY

Opposition to the idea of total abolition of diversity jurisdiction is shared by most legal practitioners. ALTA, primarily representing the plaintiff's tort bar, is joined in its opposition to a total ban on diversity by many in the defense community. The Defense Research Institute, in a statement given to the Senate Subcommittee on Improvements in Judicial Machinery in 1978, states its opposition to a total ban on diversity. The American College of Trial Lawyers, as evidenced by the testimony of Erwin Griswold before the Senate in 1978, also failed to support a total abolition of diversity of citizenship jurisdiction. Industry lawyers, such as railroad counsel are strongly against abolition.

While ATLA cannot claim to speak for every "card-carrying" member of the bar, we believe our position accurately reflects the views of most every lawyer in the country engaged in the practice of tort and contract trial law (statistics show that there are as many contract cases filed under diversity as tort cases).

The reason for this unanimous trial bar opposition should not be dismissed by this Subcommittee or anyone else as simple, pocketbook protection. Lawyers, at least the ones I know, are deeply concerned with protecting the interests of their clients. It should disturb this Subcommittee, and any investigator, that both the plaintiff and defense bar oppose total abolition of diversity, the pending proposal. Opposition to the bill by the Bar stems from a concern to provide clients with a fair tribunal to resolve disputes.

Besides the trial bar, almost all State and local Bar Associations are opposed to abolishing diversity. In a survey reprinted in the Senate hearings of last year, no State bar supported total abolition and only 2 major local bars voiced support of the concept. I have attached to the end of this statement a list of 38 state bar associations, or committees thereof, who have gone on record recently as being in opposition to abolishing diversity.

In one statement appearing in the State hearings, an article by the President of the District of Columbia Bar noted that a bill totally abolishing diversity jurisdiction would shift 400 or more cases from a relatively backlog-free Federal District Court to an already overcrowded docket of the Superior Court. Opposition by many Bar Associations can often be premised upon knowledge of the prevailing court conditions in that State vis-a-vis the Federal district court.

The lack of support by almost the entire organized bar of the country to this bill is evidence that ATLA does not stand alone in opposition to a total ban on diversity. We are comforted by the broad-based opposition to this bill and we are equally confident that opposition to H.R. 2202 is not just from a tiny handful of personal injury lawyers.

SUMMARY

In conclusion, Mr. Chairman, I want to reiterate the concerns of the Association of Trial Lawyers with H.R. 2202 and any bill abolishing Federal diversity jurisdiction. The Association believes diversity jurisdiction preserves valuable rights for those citizens who are forced to seek redress in the courts.

Congress has an obligation to carefully consider the impact of this bill prior to its enactment. Most trial lawyers would agree that those who propose change should bear the burden of proof for making that change. The Association has heard no substantial reason advanced for limiting diversity jurisdiction except the chance of lessening delay in the Federal courts, and a desire to lighten case loads. We submit that the burden of proof has not been met. Citizens' rights should not be blindly sacrificed to the goal of "judicial efficiency." The right to seek redress in the fairest forum is a right worthy of retention by this Congress.

STATE BAR OPPOSITION

As of March 1, 1979, the primary bar associations for the following States, at least, have enacted recent resolutions in opposition to any legislation which proposes to abolish diversity of citizenship jurisdiction in the Federal courts.

Alabama, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia (President and Division on Courts, Lawyers and Administration of Justice), Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Maine, Massachusetts, Michigan, Minnesota (Court Rules Committee), Missouri, Nebraska, New Mexico, New York (Committee on Federal Courts), Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Total: 38.

Mr. KASTENMEIER. As a matter of fact, according to the gentleman from California, it is not necessary for him to put a telegram from the State Bar of California in the record, because California's position appears on your list.

Mr. BEGAM. I see. I didn't know he had received a telegram. The count, I might add, is not 37 to 13. It is 37 to nothing. No bar association has, so far as I know, endorsed abolition of diversity jurisdiction, and I would be audacious enough to predict to the Chair and this committee that before too long most, if not all, of the remaining 13 will follow suit.

In conclusion, I would like to say that we are not here simply as nay-sayers, denying that court congestion is a real problem. Nor do we think that nothing more needs to be done now that we have added 150 judges to the system.

I am sympathetic to the thought that perhaps a bit more temporizing is indicated to see what the impact of adding that manpower to the system is, but I don't think that this committee would or should relax in its quest to improve the administration of justice and combat present and future delays in getting to trial.

We believe that the bar, bench, and Congress have an ongoing responsibility to improve the system, to find enhanced methods for combating delay, but not at the expense of essential justice.

What can and should be done? Well, for openers, we support the magistrates bill. We think that makes a great deal of sense. Additional manpower at a level of competence that is adequate to handle a good deal of the caseload that the magistrates bill prescribes is appropriate for handling by magistrates.

We would support a corresponding increase in jurisdictional amount. What do I mean by corresponding increase? I can visualize, and I am almost thinking out loud now, but I can visualize there being merit in a \$25,000 jurisdictional amount with magistrates handling civil controversies involving less than \$25,000 and Federal judges handling the larger cases on a more self-executing, automatic basis.

It is something I suggest you think about, and I think it would help in the congestion problem.

Arbitration. ATLA has been on the record for years as supporting arbitration across the board in all smaller civil cases and arbitration in complex and time-consuming matters such as medical malpractice litigation and product liability litigation when the amount involved is less than \$25,000.

Mandatory pretrial conference. We support that concept. We support the concept of mandatory settlement conferences.

In short, we support all these methods of making it unnecessary for people to go to court. What we oppose are proposals which bar our citizens from the only courthouse in which they can obtain justice. We perceive this is what the diversity bill would do.

In our written statements, Mr. Chairman and members, at pages 17 and 18 I list some real life examples of what I call justice factors. As the Chair has pointed out, this is the third consecutive year in which I have testified and filed a written statement listing those cases, and to date not one of the proponents of abolition has responded to those three points.

There has been some philosophical debate in these hearings as to whether the proponents of abolition have the burden of proof.

I don't want to get involved in that exercise at this hour, but I would say that, at the very least, those who advocate judicial efficiency, a cause which has become so vogueish in this and other contemporary legal debates, should not be blind to basic considerations of justice.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Begam.

You heard the first witness suggest what was, in essence, a proposal pending before this subcommittee, in addition to abolition, last year. While he didn't define the bill precisely, you recall that many had

supported a bill which would raise the jurisdictional limits to \$25,000 and would bar in-State plaintiffs from suing in the Federal court of the home State.

Is your reaction to that the same as it was 2 years ago?

Mr. BEGAM. Yes; to the \$25,000 increase in jurisdictional amount. And yes; my reaction to the barring of in-State plaintiffs is identical to what it was 2 years ago, when I characterized it as a "double-whammy."

As a representative of a partisan bar association—that is, a bar association that is traditionally on the plaintiff's side—I could be tempted by compromise that would leave diversity jurisdiction alone, but bar removal by defendants.

But I must tell you, in all honesty, that I think that would be just as unfair, just as inequitable, as the barring of in-State plaintiffs only.

Mr. KASTENMEIER. You didn't predicate your statement this morning on the basis of the fact that you believe that there would still be prejudice against out-of-Staters. This presumably is the historical basis for diversity in the first place. Is prejudice still a part of your argument? Using the hypothetical of Mr. Sawyer, does it make a difference whether it is a plaintiff from Detroit suing in Newaygo County or a plaintiff from Toledo?

Mr. BEGAM. In the section that I alluded to, without dwelling on it because of the shortness of time, I do discuss in the written statement those factors. I do think it is simply unrealistic to believe that there are no longer local islands of bias and prejudice and to not recognize that diversity jurisdiction gives us, where those factors obtain, an opportunity to get into a forum that is fairer and more evenhanded.

Now, I don't think that if you analyze the history, going back to 1789—of course, the records were a little dim—I don't think that was the original intention necessarily of the framers of the diversity rule.

Professor Rowe talked about the law of unintended consequences. And in describing the output of his paper, the law of unintended consequences also comes into play many times with our Constitution. And I think this is an example of it. I don't think the examples that I give on pages 17 and 18 of my statement were the intended consequences of diversity jurisdiction. But they are the consequences that we enjoy now and have enjoyed for many decades.

And they do impact and, I think, impact significantly on the plus side, on the benefit side, of this diversity question.

Mr. KASTENMEIER. Much of the thrust of your statement was based, at least it seems based, on the delays in obtaining justice in State courts of 37 months, 45 months, and so forth and so on, and that the delays were not, generally speaking, as long in the Federal courts and, indeed, with 152 judges, could be expected to become considerably less.

Would your position change if, let's say, hypothetically 5 years hence, the delays were no greater in State courts than in Federal courts? Somehow, if we were able to enhance judicial manpower in State courts, the States themselves were able to do that, would that mitigate your concern about doing something to diversity?

Mr. BEGAM. The way you phrase it, "mitigate" my concern, yes. Would it change my view? No. Because the congestion argument that I make is that we all go into airline terminals that are crowded, more crowded these days than others. And if there is one line leading up to

that ticket agent and there is a bottleneck in that line or congestion in that line, there isn't very much you can do about it. If there are two lines and two ticket agents, they tend to self-regulate. You get off the longer line and onto the shorter line.

And that ability that the bar possesses in cases in which the diversity option is present does self-regulate.

I think I pointed out a couple of years ago, when I was here, Mr. Chairman, in Arizona we have come 180 degrees. Ten or 12 years ago there was a much shorter line in Federal court and a longer line in State court. What happened then is a lot of cases went into Federal court that otherwise wouldn't have. Wherever the diversity option was available, plaintiffs elected it. And that did contribute both to delays on the Federal side and to alleviating the congestion on the State side.

Take away that option, take away those two lines, that self-regulating situation, and I think you aggravate the overall picture of court congestion. I don't think you help it.

Mr. KASTENMEIER. I yield to the gentleman from California.

Mr. DANIELSON. I don't believe I have any questions. I have looked over, while listening, your statement of a year and a half ago, and I have come to the conclusion you are in about the same posture as you were then.

You illustrated then some compelling and at least very persuasive arguments why you should retain diversity jurisdiction in order to obtain a better quality of justice from more diversified and broader spectrum type juries. Also, you mentioned the shorter line in the courthouse. And basically, that is what we were talking about yesterday and today, isn't it?

Mr. BEGAM. I think so. I think so.

Mr. DANIELSON. I commented then, and I think we both agree, that unfortunately, after the short line compared with the long line, I don't suppose it is the function of the Federal Government to provide additional courtrooms to take care of what should be State cases. But the fact of the matter is there are not enough courtrooms available to handle all pending litigation. And it is valuable to have this extra option.

As to the quality of juries, you made a similar point, I believe, that it is unrealistic to assume that there are not islands which contain prejudice and bias throughout the land, particularly in more remote, more rural areas. And your option for diversity gives you, in a proper case, a chance to move into what you find to be a more enhanced forum.

Mr. BEGAM. Yes, Mr. Danielson. And more to the point, if you want to really make some sweeping changes in our constitutional system that would tend to reduce delays, we could abolish the jury system.

Now, that is not before you. But a complete evolution of the jury system would obviously tend toward efficiency. No one has suggested, at least not in these hearings, we go that far.

What I am suggesting is that the jury system simply doesn't work. It isn't a question of rural bias or rural prejudice. There are counties in the United States—in your State, sir, as well as mine—in which the jury system simply does not work because there isn't a mix.

The whole purpose of the 12'ers was to have balancing and counterbalancing, bias and prejudice and viewpoints and the backgrounds the

like. And if you go into community after community, particularly in the western part of the United States, you find a sameness among the veniremen that defeats the very purpose of a jury system that does not happen in Federal districts.

And the reason it doesn't happen in Federal districts is they are in the big cities. And in the big cities is where we do have the ethnic mix. I cannot go into Kingman, Ariz., for example, Mohave County, and get a jury that has the same mix, the same ethnic mix, that I can get in Phoenix or Tucson.

Mr. DANIELSON. I understand your point. You make it very well. I do not necessarily agree that that is the purpose of the 12-man jury, in the first place.

Its roots are so far back in history, there probably weren't very many large cities at the time they started the jury system.

What is more important, the population of the world was not nearly as mobile as it is today. People were born, got married, raised their families, and died in the same community. Today we are so fluid that nobody knows where anyone came from or where he is going to be 5 years from now.

Witness one thing: We are familiar with character and reputation testimony. Well, 500 years ago, when the people in the lawsuit never moved from the village in which they were born, certainly a person's reputation in that community meant something. Everybody knew everybody.

It just turned 180 degrees. Today, if anybody on the panel knows anybody in the litigation, they are excused. In a village of 500, 200 years ago, I would almost challenge you to pick a juror who didn't know everybody involved in the lawsuit. It is totally reversed.

But your point is very valid. I don't know that it is totally persuasive to me, but I certainly can't pick any holes in it. And I thank you for taking the time to come and tell us about your position.

Mr. BEGAM. Thank you.

Mr. KASTENMEIER. Let me again also, on behalf of the committee, thank Mr. Begam. I think it is an excellent statement, clearly stating his position and that of the American Trial Lawyers Association.

Mr. BEGAM. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Now, I would like to call as our final panel of witnesses today—and the first member of that panel intends to proceed only briefly because he has another obligation, the Honorable James Duke Cameron, chief justice of the Arizona Supreme Court.

With him also is the Honorable Robert J. Sheran, chief justice of the Supreme Court of Minnesota. Justice Sheran has been a witness before this committee before, and we welcome him back.

And I would like to first call on Chief Justice Cameron, because I know that he does have an obligation to be at another place shortly, and give him a chance to make a statement.

As well, I would like to greet Chief Justice Robert Utter of the Supreme Court of the State of Washington, who joins his colleagues. This is his first appearance before our committee.

You all are welcome.

Chief Justice Cameron?

TESTIMONY OF HON. JAMES DUKE CAMERON, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF ARIZONA, AND CHAIRMAN OF THE CONFERENCE OF CHIEF JUSTICES; HON. ROBERT J. SHERAN, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF MINNESOTA; AND HON. ROBERT F. UTTER, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF WASHINGTON

Justice CAMERON. Thank you, Mr. Chairman.

As you indicated, I am chairman of the Conference of Chief Justices of the United States, and I speak on behalf of that conference in support of the diversity bill.

I will not make any further remarks, and I will be happy to answer your questions.

Chief Justice Robert Sheran has been chairman of our State-Federal relations committee for 5 or 6 years now. I can assure you that he speaks for the Conference of Chief Justices in this legislation. And he has written on it. He has written law review articles on it. And I would turn the chair over to him at this time.

I would also beg the indulgence of the committee if I get up and leave in about 5 minutes because I do have another appointment.

Mr. KASTENMEIER. You communicated that, and we certainly understand. We are very pleased to have you here today, indeed.

Justice CAMERON. If I can answer any questions now, I will be happy to do so.

Mr. KASTENMEIER. I think, Chief Justice Sheran, we will turn to you, then, to be spokesman.

Justice SHERAN. Mr. Chairman, members of the committee, I have prepared a written statement which I will file with the committee. I am going to try to summarize it, in the interest of time.

Mr. KASTENMEIER. Without objection, the statement will be received and made a part of the record.

[The statement of the Conference of Chief Justices follows:]

STATEMENT OF ROBERT J. SHERAN, CHIEF JUSTICE OF THE SUPREME COURT, STATE OF MINNESOTA, AND CHAIRMAN OF THE FEDERAL-STATE RELATIONS COMMITTEE OF THE CONFERENCE OF CHIEF JUSTICES

Mr. Chairman and members of the subcommittee:

On July 28, 1977, it was my privilege to appear before this subcommittee and make a statement on "The State of the Judiciary and Access to Justice" which was considered relevant to the legislation then pending in the House concerning diversity jurisdiction. Since that time two events of importance have occurred:

1. On August 3, 1977, the Conference of Chief Justices went on record in support of the transfer of all diversity cases to State courts.

2. Of greater significance, the House of Representatives by a two-thirds vote passed the Kastenmeier bill eliminating federal court diversity jurisdiction. Although the bill did not reach the Senate floor, the House of Representatives' expression of confidence in the capacity of State courts to handle diversity cases is in and of itself most encouraging.

The events of the last 2 years give further support to the basic assumptions which underly the Kastenmeier bill:

That the burdens of the Federal courts are increasing at a rate faster than can be handled effectively by the Federal judges to be authorized by the Congress.

That the capacity of the State courts to accept additional responsibility is at a high level and constantly rising.

It is true, of course, that Public Law 95-486 became effective October 20, 1978, increasing the number of federal district judges by 117 to a total of 516 and in-

creasing the number of Federal circuit judges by 35 to a total of 132. But the history of this law in itself gives evidence of the fact that Congress is slow to permit the number of federal judges to grow at a rate corresponding to the increase in the demands being made upon the Federal courts. The number of cases being filed there continues to increase. At the present rate of growth, 600 more Federal judges will be needed by 1988 to keep abreast of the work. Observation of the struggle involved in the enactment of Public Law 95-486 tells us that this will not occur. There is an historical reluctance on the part of Congress to increase the number of Federal judges which is easy to understand when we consider that appointments for life are irreversible; that unlimited increase in the number of Federal judges disturbs the delicate balance of power between the separate and independent branches of that government; and that the conflicting forces which must be satisfied before legislation such as Public Law 95-486 can become law are great in number and persistence. Yet we know when we consider the causes of the multiplication of cases coming into our courts that the rate of increase will continue or accelerate.

As our population increases, litigation increases. By the year 2000 it is predicted the U.S. population will reach about 250 million, but numbers of people is only part of the story. It is the concentration ratio and movement of the population which exacerbates conflict and we know that in the United States increased urbanization and mobility are a certainty.

In the past, resort to the courts has been limited for some by lack of funds. But in the United States increasing affluence, public financing and essential legal services and the development of private plans for prepaid legal services will, in the future, make the courts more accessible more frequently to more of our citizens.

Crime, a principal cause of the increasing demands upon court resources, continues to increase and there is no indication of a likely reversal of this trend.

Public expectations of court assistance in protecting the rights of the individual have reached an unprecedented level, a trend likely to continue.

The extensions of insurance—particularly casualty insurance—serve both to protect individuals from risk or loss and invite the assertion of claims. This is a trend which has been constant over the last 40 years and is likely to continue.

Legislation enacted by the Congress and the States as, for example, in the areas of environmental protection and civil rights, and the rigorous enforcement of more ancient laws as, for example, antitrust legislation, seems responsive to public demands not likely to change in the years ahead.

The conclusion seems inevitable that the annual rate of increase in litigation is likely to continue at the present rate or more.

The experiences of the last 2 years reinforce the conviction that efforts to divert controversies from the courts to other agencies for dispute resolution will not afford adequate relief. Notwithstanding increased efforts to encourage arbitration, mediation and conciliation as an alternative to resorting to the courts and increased insistence that administrative remedies be exhausted when available as a pre-condition to court action, the number and complexity of cases coming to the Federal courts and the "back log" of undecided cases continue to grow.

The most logical course then, it seems to me, is to analyze the character of the cases coming to Federal courts in an effort to see if the State courts of general jurisdiction (manned by at least ten times as many judges as are serving in the Federal judicial system) can be of greater assistance than is now the case.

The principal field of inquiry must be in the area of civil against criminal litigation. The multi-State character of criminal activity increasing in volume and intensity make it unlikely that the burdens of the Federal courts in the field of Federal criminal prosecutions can be shifted to the State courts to the extent necessary if significant relief is to be achieved. It is in the area of civil litigation that attention should be focused.

The total number of civil cases which will be filed in Federal courts in fiscal year 1978 will approximate 150,000. Of these, slightly over 50 percent will be cases involving cases of Federal statutory law. Although State courts were entrusted with cases of this type during the first 100 years of our national history, the special competence of Federal judges to handle cases involving questions of Federal law seems evident enough. The nuances of civil rights claims (10 percent), the special expertise involved in the handling of copyrights, patents and trademarks (2 percent), the unique Federal characteristics of social security (8 percent), the national implications of cases arising under

Federal labor laws (6 percent), the complexity of some environmental cases (limited in number but great in resource demands) serve as constraints to extensive transfer of cases in these categories to State courts.

But 25 percent of the cases now being handled in Federal courts do not involve questions of Federal law in any way. These are the "diversity cases." These are the cases which Chief Justice Burger once again at Atlanta—only 3 weeks ago at the Midyear Meeting of the American Bar Association—urged the Congress to relinquish to the courts of the States. I respectfully submit that there are at least ten reasons why this advice should be followed:

1. Article III, section 2 of the U.S. Constitution provides that the judicial power of the United States extend to controversies between citizens of different States and since 1789 the constitutional provisions has been implemented by the provisions of congressional enactment. But the demands on Federal courts in the 18th century were limited and the trial of diversity cases was then considered more as an opportunity than a burden. This is no longer true.

2. Diversity cases involve interpretations of State law. In our Federal system State courts are the final arbiters of State law. It is an awkward situation for Federal trial judges to be interpreting State law and precedents when errors which are bound to occur cannot be corrected by the highest court of the State, the laws of which are being applied.

3. Diversity cases, for the most part, involve claims arising out of contracts or suits for damages for personal injuries, because of defective products or automobile accidents. These are the kinds of litigation which State court judges handle regularly and routinely. Federal court judges, whose major responsibilities are in other areas, have neither a special interest or expertise in cases of this kind.

4. Diversity jurisdiction attaches only if the amount in controversy exceeds \$10,000. Often the "amount in controversy" question—wholly irrelevant to the merits of the case—is challenged and valuable judicial time is wasted in a contest over this collateral issue. Apart from this, there is no reason in principle why the \$10,000 judicial limit—or any other larger amount—should distinguish cases triable in Federal court from those which are not. The citizen's right to justice should not turn on the dollar value of his claim. The suggestion that "Federal" is "better" and that the "big" claim deserves the "better" treatment is inconsistent with accepted notions of fair play in a democratic society.

5. Diversity jurisdiction attaches only if diversity of citizenship as between the parties is entire. For example, if a resident of Minnesota sues Ford Motor Co.—a Michigan corporation—because of a claimed defect in an automobile manufactured by it, the Ford Motor Co. can, if the case is venued in Minnesota, remove the lawsuit to Federal court if the amount in controversy exceeds \$10,000, unless it has a principal place of business in Minnesota. The question of whether a place of business is a principal place of business as well as the question of whether a true diversity of citizenship exists can be placed in issue and if it is, valuable judicial time is wasted on a question having nothing to do with the merits of the case. If it is established that the Ford Motor Co., a Michigan corporation, does not have a principal place of business in Minnesota, the case is tried in Federal court. But if the plaintiff in such an action were to join a Minnesota dealer as a defendant, the case could not be removed. The requisite complete diversity of citizenship between the parties could not exist. How can it be argued that the Ford Motor Co. needs protection from Minnesota courts in the one case but not in the other?

6. In the great bulk of cases where a nonresident is a party, the case is tried in State courts and cannot be removed. The numbers of these cases in State courts have increased greatly because of the enactment of long-arm statutes which permit effective service on nonresidents. No one seriously contends that the nonresident party suffers from local prejudice in these cases because of its nonresidence. If it suffers a disadvantage because of its being a corporation, this is due to factors which apply to every business entity involved in litigation, resident or nonresident. There is no reason to give a nonresident business entity an advantage not available to the others.

7. In any event, removal to Federal court does not change the situation insofar as it is affected by claims of prejudice based on nonresidence. The jurors in Federal courts are residents of the same State as are State court jurors. Federal court judges have the same essential background as do State court judges. Many of them have served as State court judges before moving to the federal branch. The security of life tenure of federal judges is an irrelevant

consideration in the kinds of cases (contracts and torts) where diversity jurisdiction is involved.

8. There are prejudices to be found in both State and Federal courts which impede the administration of justice—prejudice based upon hostility toward corporations; upon identification with the underdog; upon consideration of race and sometimes ethnic or religious background. But prejudice based upon State of residence is so insignificant as to be unimportant. To the extent that prejudice of any kind exists in a court system, it should be corrected. But to suggest that it can be cured even in part by permitting removal of diversity cases is to compound the problem by obscuring its cause.

9. The power to remove diversity cases from state to federal court gives tactical advantage to the party seeking delay. This is so because given the priorities to be accorded criminal cases under the Speedy Trial Act and the pressing demands involved in many federal question cases, the trial of diversity cases in many federal courts is extremely difficult to achieve.

10. The implicit assumption of diversity jurisdiction that a fair trial cannot be secured in state court notwithstanding the fact that the case involves state law exclusively, demeans state court systems at a time when national efforts to improve the state courts should be recognized and encouraged. Assignment of jurisdiction of all diversity cases to state courts will stimulate the movement to strengthen and improve state judicial systems in every part of the country so that the ultimate goal of justice uniformly and expeditiously afforded will be available to every citizen of the United States.

The obligation to provide access to the courts for the resolution of disputes and controversies is neither exclusively federal or state. It is a joint obligation best fulfilled by allocating its burdens in a responsible way between the federal and state governments.

I know that the members of Congress are keenly interested in the effect of federal legislation on state court systems. Your constituents are state citizens, the same as are mine. No matter what is done with diversity cases, 90 percent of the judicial problems of the people of this country will continue to be resolved in state courts. As representatives of the states you have, I am certain, the same concern for the well being of state courts that state jurists should have. Your kindness in inviting Chief Justice Cameron and me to appear here is evidence of your views in this regard.

I feel justified, therefore, in calling your attention to the dramatic changes taking place in the judicial systems of the states during the past 15 years which give added assurance of their competence to handle personal injury and contract cases, regardless of the citizenship of the parties:

A stringent code of judicial ethics proposed by the American Bar Association has been voluntarily adopted in almost every state.

Continuing legal education for judges and court-related personnel is generally available and is provided not only through local programs but also through national institutions such as The National Judicial College at Reno, Nevada.

Procedures for the removal and discipline of state court judges have replaced ineffectual impeachment procedures in a great part of the country.

Increasingly, the states are insisting that judges of general jurisdiction be carefully selected and well trained.

The employment of modern methods of court management and administration have become commonplace and The Institute of Court Management has been established to provide the necessary training for those involved in this work.

The National Center for State Courts has become the indispensable right arm of the Conference of Chief Justices in making essential information and services available for the improvement of state court systems.

It is interesting to note that the improvement of state court systems has been, in part at least, a reaction to the increasing responsibilities pressed upon state court judges by the federal government. Decisions of the United States Supreme Court beginning in 1963 have established new minimal standards for the trial of criminal cases in state courts by expanding the application of the due process and equal protection clauses of the federal Constitution.

The federal government taking leadership in such areas as environmental protection has established a pattern which has been followed by the legislatures in most of the states.

Congressional enactments giving statutory definition to individual rights provide for concurrent jurisdiction in state and federal courts.

And in many instances federal funds are made available to the states only when action is taken in state courts as a pre-condition of eligibility.

The Conference of Chief Justices at its recent meeting in Atlanta has committed itself to a re-examination of the appropriate relationship between the federal government and the states in fulfilling our joint responsibilities of affording to each person a certain remedy for the wrongs which he may receive to his person, property or character.

In a democratic society which properly emphasizes the right of the individual to live and express himself freely, conflicts between persons and between individuals and the state are inevitable.

The controversies generated by freedom must be settled fairly, economically and expeditiously so that the energies of our people can be directed toward constructive action and thought.

If disputes, controversies and conflicts are to be settled, adjusted or resolved, the people of this nation must have ready access to the courts.

Because federal courts are by constitutional definition courts of limited jurisdiction and because traditionally state court systems have provided the place for resolution of most disputes, it is in everyone's interest that state court systems be made as responsible to the needs of people as possible.

The support and improvement of state court systems is a responsibility of all the people in this country and their representatives whether they be acting through federal or state governments. Article VI of the United States Constitution provides in part:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

These considerations and ever-increasing appeals to the courts for dispute resolution makes it imperative and timely that the federal government and the states engage in a joint effort to achieve these objectives:

1. To make the courts of our nation, state and federal, accessible to everyone. This means that adequate court rooms at convenient places must be available; that well-qualified judges be selected and retained to supervise the judicial process; and that adequate legal services be provided to assist with the average person's problems at a cost which the average person can afford.

2. To divert from the courts of the country disputes and controversies which can be settled more expeditiously and effectively by other means and in other places. This objective recognizes that there are circumstances where such methods such as arbitration, conciliation and mediation work better than the formal processes of the courts. The process of identifying these cases is difficult and important.

3. To be certain that the judicial systems of the nation function efficiently. This objective calls for emphasis on the importance of improved methods of judicial administration, the employment of modern management methods and the training of court-related personnel so that the work of the courts will be conducted as efficiently and effectively as possible.

4. To reduce the costs of dispute resolution. This objective recognizes that justice is frequently unattainable by many people because of the expense involved in obtaining access to the courts. Justice which cannot be afforded is justice denied.

5. To extend educational programs so that those who administer justice are kept fully and currently informed and those who seek justice are made aware of the availability of help through the nation's court systems. This objective implies that the law to be applied in the resolution of disputes is constantly changing as the needs of society change and that all people concerned with justice must be continuously educated to keep abreast with the times.

6. To divide the responsibility for providing access to the court systems of the nation between the state and federal court systems in such a way as (a) to employ the total capacity of both systems as effectively as possible; (b) to avoid duplication and repetition of effort; (c) to keep the process of dispute resolution both civil and criminal as close to the people affected as possible; and (d) to preserve the independence and integrity of state courts. This implies that the general jurisdictional responsibilities of the court systems should be placed primarily in the courts of the states; that the federal court system should continue to be one of limited and specialized jurisdiction; and that the efforts of both the state and federal court systems should be coordinated and integrated in such a way as to make the system as a whole work as effectively as possible.

I respectfully submit that the allocation of all diversity cases to the courts of the several states is an appropriate beginning step in the joint federal-state effort to improve and make more efficient the administration of our nation's court systems.

Indeed, I would also like to make reference to the fact that you have scholarly work in print, or about to be in print, in the Law Review article on the subject that you are dealing with this morning.

Justice SHERAN. I would appreciate the privilege of sending a copy of that article to the committee. I realize, because of the length, it may not be appropriate for formal treatment, but I think it might be useful in some aspects to you. With your permission, I will send it.

Mr. KASTENMEIER. We would be pleased to receive it. (See appendix II(c) (1), at 267.)

Justice SHERAN. Mr. Chairman, I am going to make a few statements directly from my statement; but for the most part, I will be paraphrasing it. I am hopeful that any member of the committee who cares to interrupt with questions or ask them later would feel free to do that.

On July 28, 1977, it was my privilege to appear before this subcommittee and make a statement in support of the diversity jurisdiction bill. Since that time, two events of some importance, in my view of things, have occurred that I think are relevant to your present inquiry.

One is that the Conference of Chief Justices, which is the organization made up of the chief justices of all of the States, has passed a resolution reflecting the willingness and the competency of the courts of the States to handle the diversity cases presently being taken care of in Federal court.

The second is that the bill which came out of this committee did receive a two-thirds vote in the House of Representatives, which, in and of itself, is encouraging to those of us responsible for the operation and improvement of State court systems to the extent that it reflects a measure of confidence in our capacity to deal with cases which involve exclusively matters of State law.

It is, of course, true that in the meantime the number of Federal judges has been substantially increased. But the prospect of that being the case was true when this committee's bill was passed by the House.

Beyond that, and without going into detail, the history of that bill as it moves through the Congress is, in and of itself, evidence of the difficulty of adding a sufficient number of Federal judges to meet the burgeoning caseload. If it be true that within 10 years the increase of Federal cases in Federal courts, of which diversity cases are a major part, will require a very substantial increase of Federal judges above the present level, the difficulties of achieving that end are such as to make it advisable to explore other alternatives.

When one analyzes the reasons for the increase in the demands upon Federal courts and all courts for their services, the probabilities are quite high that the 8-, 9-, 10-percent annual increase of cases coming into our court systems will continue in the years ahead.

It is true that major efforts have been made to find alternative ways of dealing with these problems, as has been suggested by witnesses appearing before this committee. But the important point is that, notwithstanding heroic efforts to find ways to divert cases from the court systems and to deal more effectively with those that are there, such as the 40-percent increase in number of cases handled per Federal judge

that has occurred since 1970 in the Federal system, the net backlog of undecided cases in the Federal system continues to rise.

This means, then, that analysis of litigation in both Federal and State courts should be made in an effort to determine whether the movement of the small segment of diversity cases still in Federal court to the State courts, is a reasonable way of dealing with the problem.

There are at least 10 sound reasons why this should be done.

The first is that the historical reasons given for the retention of diversity jurisdiction seem not to be persuasive. It is true, of course, that when the Constitution was adopted, it made provision for the Federal courts to have jurisdiction over cases where there is a diversity of jurisdiction between citizens of the States.

And it is true, also, that from the first judiciary act Congress has made limited provisions for the handling of such diversity cases in Federal court.

But at the time the Constitution was adopted the Federal courts did not have more work to do than they could handle. Students of the subject tell us that the Federal judges were at a loss for something to keep their talents fully occupied. Moving out of a situation where each of the Thirteen Original Colonies regarded itself as a sovereign and independent government and where there were real and genuine hostilities based upon colony of residence—later State of residence—concerns about the possibility of prejudice based upon residence were much more real—much more tangible—than is the case today.

Second—and this I would emphasize—diversity cases involve interpretations of State law, not Federal law. In our Federal system, State courts are the final arbiters of State law. It is an awkward situation for a Federal trial judge to be interpreting State law and precedents when errors, which are bound to occur from time to time, cannot be corrected by the highest court of the State, the laws which are being applied.

The subject that we are talking about now is one that I discuss frequently with the chief judge of our Federal district, Judge Edward Devitt. And he shares with me the view that it is an awkward and unseemly situation for the Federal court trial judges in Minnesota in the close cases where the law is uncertain to be undertaking to ascertain the law of Minnesota, knowing that the real responsibility under the Federal system for that lies, not with the Federal judges, but instead with us.

Third, diversity cases, for the most part, involve claims arising out of contracts or personal injury claims resulting from automobile accidents or product liability. These are the very kinds of litigation which State court judges are handling routinely. I do not think this kind of litigation is of special interest or within the special capacity of federal judges.

Diversity jurisdiction attaches only if the amount in controversy exceeds \$10,000. It has been suggested that this should be raised to \$25,000. Were this to be done, it would merely highlight what I consider to be the force of this point: Often the amount in controversy, a wholly irrelevant question insofar as the merits of the case is concerned, is challenged. Valuable judicial time is wasted in trying to decide the issue.

Apart from this, there is no reason why on principles of justice—as distinguished from principles of economics—the \$10,000 judicial limit or any other larger amount should distinguish cases tried within Federal court from those which are not. The citizen's right to justice should not turn on the dollar value of his claim. The suggestion that Federal is better and that the big claim deserves the better treatment is, I believe, inconsistent with accepted notions of fair play in a democratic society.

Furthermore—and I stress this—diversity of jurisdiction attaches only if diversity of citizenship as between the parties is entire. And I am suggesting to you that cases in which one of the parties to litigation in State courts is a resident of a State other than the State of the forum are commonplace. It is only where the amount in controversy is greater than \$10,000 and the diversity is complete between plaintiff and defendant, that removal is possible.

For example, if a resident of Minnesota sues the Ford Motor Co., a Michigan corporation, because of a claimed defect in an automobile manufactured by it, the Ford Motor Co. can, if the case is venued in Michigan, remove the lawsuit to Federal court if the amount in controversy exceeds \$10,000, unless it has a principal place of business in Minnesota.

The question of whether it has a principal place of business, whether there is a true diversity, as I have indicated, sometimes is a separate lawsuit in itself. But let's assume it has no principal place of business; the amount in controversy is in excess of \$10,000. And in this instance, true diversity exists. That case can be removed. But if, in such an action, the plaintiff joins a local dealer, Ford franchise dealer, the case can't be removed.

Now, how can it reasonably be argued that the Ford Motor Co. can't get a fair trial in State courts of Minnesota if it is in as a defendant by itself, but it can get a fair trial if the local franchise dealer, sometimes asserting cross claims, is added to the case. You can't justify removal in terms of a principle that applies across the board. It is merely a specialized kind of favored treatment for a narrow segment of cases that come into the Federal courts?

In the contract and personal injury fields, it is inappropriate to suggest that State courts cannot handle the cases adequately. We now have the obligation for the great bulk of it. And in the great bulk of cases where a nonresident is a party, the case is tried in State courts and cannot be removed.

The numbers of these cases in State courts have increased greatly in current times because of the enactment of long-arm statutes which permit effective service on nonresidents. No one seriously contends that the nonresident party suffers from local prejudice in these cases because of nonresidence. If it suffers a disadvantage because of its being a corporation, this is due to factors which apply to every business entity involved in litigation, resident or nonresident. There is no reason to give a nonresident business entity an advantage not available to others.

In any event, removal to the Federal court doesn't change the picture all that much. The jurors, generally speaking, come from the same categories of people. And the notion that there are provincial peoples so laden with prejudice that there cannot be a fair trial in some rural areas is inconsistent with my experiences in the trial field.

There are prejudices to be found in both State and Federal courts which impede the administration of justice, to be sure. Prejudice based on hostility toward corporations, prejudice based upon overidentification with the underdog, prejudice based upon considerations of race and sometimes ethnic or religious background. We know that to be true. But prejudice based upon State of residence, in my judgment, is so insignificant as to be unimportant. To the extent that prejudice of any kind exists in the court system, it should be corrected; no question about it.

But to suggest that it can be cured even in part by permitting removal of diversity cases is to compound the problem by obscuring its cause.

The power to remove diversity cases from State to Federal court gives tactical advantage, I believe, to parties seeking delay. This is so because, given the priorities to be accorded criminal cases under speedy trial act—and it is called to my attention that Attorney General Bell has said that a great number of Federal criminal cases will have to be dismissed because they cannot meet the requirements of the speedy trial act—but given those cases, the priority that the speedy trial act demands, given your civil rights cases and other cases arising under the Federal priorities which these cases should be given, to remove a diversity case from State court where I contend it belongs, and put it at the end of the line in Federal court in the interest of judicial efficiency is not reasonable.

And finally, the implicit assumption of diversity jurisdiction that a fair trial cannot be secured in State court, notwithstanding the fact that the case involves State law exclusively, demeans State court systems at a time when national efforts to improve the State courts should be recognized and encouraged.

Assignment of jurisdiction of all diversity cases to State courts will stimulate the movement to strengthen and improve State judicial systems in every part of the country so that the ultimate goal of justice uniformly and expeditiously afforded will be available to every citizen of the United States.

Now, one of the arguments that is made against movement of remaining diversity jurisdictions out of the Federal courts is that there are areas of high population density around the country where excessive delays would occur.

And I must concede that if I were back in trial practice and if I were concerned about the particular interests of a particular client in a particular situation and I thought that to be true, my view of the matter would be that I would prefer the option to go the alternate routes, even though the option were a limited one in a limited kind of diversity case.

We have had this discussion before as to what is the situation in Manhattan, in Boston, in Philadelphia, and in Chicago. And I don't think we have developed adequate statistics yet.

But this much I know for certain, that given the priorities that have to be given to criminal cases in all Federal courts, given the priorities that should be given to cases that are of particular Federal responsibility, diversity cases will move faster in State court than in Federal court.

I am quite certain that you won't have as some have claimed twice the delay in State court that you do in Federal court. The conversa-

tions that I have had with the State administrators in New York, in Illinois, in Massachusetts, have led me to believe that so far as diversity cases are concerned—and that is what we are talking about—the Federal courts cannot respect priorities and still try diversity cases promptly.

If the chief justice of a State makes a statement publicly that the State courts are ready, willing, and able to handle cases which are in their natural orbit of responsibility, we should be careful in the use of statistics that would dispute what in my judgment, at least, should be considered a fairly responsible opinion.

I think it is incumbent on all of us that are concerned about this matter to concentrate our attention on the impact that will result in the centers of population. We just don't have as good a handle on that problem as we should have. But I am sure it is obtainable. And I will predict that the figures, when they are put together, will not demonstrate that you can get a diversity case moved through the Federal court in half the time you could get it moved through the State court in New York, Massachusetts, Pennsylvania, and Illinois, or the centers of population in those States.

So that is something that remains yet to be seen.

In conclusion, the suggestion has been made that the position of the Conference of Chief Justices represents a missionary attitude. I am not sure whether that criticism is justified, but let's assume that it is. Ninety percent of the cases that are handled in the United States are handled in State courts now.

And the Members of this Congress have the same interest and concern about how those 90 percent of the cases are handled as they do as to how the 10 percent of the cases in Federal courts are handled, I believe.

Beyond that, the segment of the Federal cases that amount to diversity cases presently kept in Federal court, although it is 26 percent of the total caseload, civil caseload, is as compared to the totality of litigation in this country, not that big a thing.

The important thing is that in a democratic society, the citizens of this country be afforded a place to go where they can receive justice expeditiously, economically, and fairly. And it is in State courts that this must be accomplished.

I believe that to shift the remaining diversity cases to the State courts is a forward step in this direction. And that is why I speak with firm conviction in support of this bill.

Mr. Chairman, Chief Justice Utter of Washington has approached this question from a position somewhat different than mine recently. And he has some comments which could be expressed, I think, in a couple of minutes.

And with your permission, I would like to yield to him.

Mr. KASTENMEIER. Chief Justice Utter, we would be pleased to have your comments.

Justice UTTER. Mr. Chairman, honorable members of this committee, I think the fascination I have for Justice Sheran is that of a converted sinner. I was opposed to acceptance of State courts of Federal cases and had based this opposition on my intuitive feeling that the impact of those cases in our State would have an adverse effect.

I asked our court administrator to study what the actual impact of the acceptance of those cases would be on both the metropolitan and

rural courts of our State. I will forward that study to this committee. I do not now have it.

Mr. KASTENMEIER. We would be happy to receive it.

Justice UTTER. It indicated to the effect that it would be indeed minimal and our courts could handle it. I then joined Justice Sheran's position, but only after really going against an initial impression which turned out to be wrong.

Our delay factor in our State is much the same as it is in Arizona. Our State courts try cases in rural areas within 6 months. Our State courts in our rural-urban areas try them within a year at the maximum.

The time for trial for civil cases in our Federal courts is between 3 to 4 years at this point.

We are not a large State, but our total population approaches that of one of the large urban centers that the previous witnesses have testified to. That is the limited nature of my remarks. (See appendix II(c) (2), at 336.)

Thank you.

Mr. KASTENMEIER. Thank you. And, of course, we wish you the very best in your inquiry, your study, with respect to improvement in the court system that you have undertaken.

Mr. KASTENMEIER. We do have a vote on. I am going to ask my colleagues if they wish to question the witnesses.

Mr. DANIELSON. If the chairman would yield——

Mr. KASTENMEIER. Let me say I think we have time for about a question each.

Mr. DANIELSON. I am not even going to ask a question. I will simply make a statement.

I want to thank both of you gentlemen for your presentations. You were excellent and to the point. I always feel much better off when you put aside your statements and just ad lib it. It comes through to me much better, at least.

I want to thank you.

We have an extremely interesting point up to vote on. And not only dare I not miss it, I just would not miss the opportunity to vote on it. So I thank you and beg your permission.

Mr. KASTENMEIER. You may have my permission.

Mr. SAWYER. This is just really a comment rather than a question. I have great respect for the State courts around the Great Lakes region. And that is not to exclude the gentleman's State of Washington, only because I haven't been exposed to those.

The courts of Minnesota, Wisconsin, and Illinois, Michigan, Ohio, and Indiana, I am familiar with, and have spent a lot of time in them.

And there are certainly equivalent to the judicial caliber of an equal number of Federal judges in comparison in my opinion.

And my concern really would go more to the restriction of the source of jury delays than it would the caliber of either the State courts or the justice, in that you get a somewhat broader area empaneled as opposed to a countywide area of the State.

And the other thing is that I am somewhat fearful that the States may be visited with this 90-day rule in criminal practice before long which seems to be the trend. And they handle about 90-plus percent of all the criminal cases. So that might, first, impact those State

courts more than now; and, second, we have just multiplied the Federal judiciary by three times.

And my question is more just a vacillation on whether now is the time to change a rule that we have had for so long until we see what the improvement in the judicial personnel numerically in the Federal court and magistrate system broadening and some other things have.

So many people perceive, rightly or wrongly, that it is a very important right to them as lawyers or clients, but I appreciate listening very much.

Thank you, Mr. Chairman. That's all I have.

Mr. KASTENMEIER. I would like to add my personal thanks to Chief Justice Sheran for returning again and restating his compelling position and that of his association with respect to this question.

I appreciate the testimony of the Chief Justices Cameron and Utter as well.

We do have, as it has been pointed out, certain new circumstances insofar as we have created 152 new judgeships for the Federal courts. But I take it your position is the same irrespective of this. There are many other reasons, other than the amount of judicial manpower that either of our judicial systems has at any particular time, to mandate abolition of diversity jurisdiction. Is this not correct?

Justice SHERAN. That is true, Representative Kastenmeier. I have made the statement, and I am not too sure that this particular point of view is one that would be generally shared, but in my view of things, cases involving State law belong in State court.

And that would be true regardless of the congestion in the Federal courts, although I realize that to make the case and make the case persuasive, it has to be done on both fronts.

Mr. KASTENMEIER. Well, on behalf of the committee, thank you for your appearance this morning.

This concludes this morning's hearings. We will resume again on Thursday next at 3 p.m.

We will have two more witnesses on this question, and we then will terminate. The committee is adjourned.

[Whereupon, at 1:06 p.m., the hearing was adjourned to reconvene at a future date.]

DIVERSITY OF CITIZENSHIP JURISDICTION/ MAGISTRATES REFORM—1979

THURSDAY, MARCH 8, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 3 p.m. in room 2226 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Gudger, Matsui, Mikva, Moorhead, and Sawyer.

Also present: Michael J. Remington, counsel, and Thomas E. Mooney, associate counsel.

The committee will come to order. We now have three members present.

The committee today has scheduled a markup on a minor bill involving judicial districts, which we will reach a bit later when a voting quorum arrives. In the meantime, we will reverse the original schedule today. The last witness, who is here, we will call as our first witness today.

Our first witness will be Michael B. Trister. Mr. Trister is a practicing attorney for the law firm of Sobol & Trister. He has been active in an informal access to justice study group which is based here in Washington, D.C., and is in fact one of the motivating forces behind that group.

Today he will be testifying on behalf of the Center on Social Welfare Policy and Law.

Mr. Trister, you are most welcome. You may proceed.

TESTIMONY OF MICHAEL B. TRISTER, ESQ., PRACTICING ATTORNEY, ON BEHALF OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW

Mr. TRISTER. Thank you, Mr. Chairman.

I have a word about the Center on Social Welfare Policy and Law. It is one of the support centers funded by Legal Service Corporation, and it has been working for the past 10 or 12 years in the area principally of public assistance benefits under the welfare program, the medicaid program, and social security program. They've had a long and vigorous history of working in that area in the Federal courts, and it's based on that experience that I'm here to testify today.

I have a statement I previously submitted to the committee staff, and I would ask that it be submitted into the record.

Mr. KASTENMEIER. Without objection, it will be received and made a part of the record.

[The statement of Michael B. Trister, Esq., follows:]

STATEMENT OF MICHAEL B. TRISTER, ESQ., ON BEHALF OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, INC.

Mr. Chairman and members of the subcommittee; my name is Michael B. Trister. I am a partner in the Washington, D.C. lawfirm of Sobol and Trister, and I am appearing today on behalf of the Center on Social Welfare Policy and Law, Inc. (Welfare Law Center), a legal services support center that specializes in the rights of needy persons under federal public assistance and related programs.

I would like to make three points regarding H.R. 2202 and H.R. 1046: First, I would like to convey the Center's support and the support of other legal service attorneys for the provisions of H.R. 2202 that abolish diversity jurisdiction. Second, I would like to emphasize for the committee the importance of the other portions of H.R. 2202 that abolish the amount in controversy requirement in federal question cases. Third, I wish to urge the committee to delay action on H.R. 1046, the Magistrate bill, until the committee can consider the impact on the bill of a proposal soon to be made by the Department of Health, Education and Welfare to eliminate judicial review of factual determinations in social security cases.

1. ABOLITION OF DIVERSITY JURISDICTION

As this committee noted last year in its report to accompany H.R. 9622, protection of the basic constitutional and civil liberties of citizens and the enforcement of federal statutory rights is the job for which the federal courts are best suited. We would add that for poor and minority persons, the protection of the federal courts is especially important, since it is often the only means they have to obtain the basic necessities of life such as adequate housing, jobs, or the cash assistance they need to survive.

As has been demonstrated by other witnesses before this committee, assignment of ordinary accident and contract cases to the federal court system is neither necessary nor appropriate. Moreover, by contributing significantly to the congested dockets in the federal courts, diversity cases delay and otherwise interfere with cases brought to vindicate basic federal rights. For this reason, a panel of legal services attorneys, including Henry Freedman, Director of the Center, testified last year before the Senate Judiciary Committee in favor of the total abolition of diversity jurisdiction. The position of the Center and other legal services attorneys throughout the country on this issue remains unchanged. We continue to strongly support the total abolition of diversity jurisdiction, as proposed in H.R. 2202.

2. ABOLITION OF THE AMOUNT IN CONTROVERSY REQUIREMENT
IN FEDERAL QUESTION CASES

Although we join with many others in supporting abolition of diversity jurisdiction, legal services attorneys have a special interest in another provision of H.R. 2202 that has received less attention but is no less important to the rights of the poor. That is the amendment in section 2 of the bill that would eliminate the amount in controversy requirement for jurisdiction in cases involving federal questions.

Professor Charles Alan Wright has identified several areas for this committee in which the retention of the amount in controversy requirement poses a barrier to the enforcement of federal rights in federal court. One of the most important areas identified by Professor Wright involves cases brought by recipients of public assistance, medicaid and other federal benefits to enforce their federal statutory rights. Under the current caselaw, if the plaintiffs allege that their constitutional rights have been violated, they may also assert their federal statutory claims, without regard to the amount in controversy; but if they have only a statutory claim, without a constitutional claim, they may not be able to sue in federal court.

Apart from the technicalities of section 1331, there is no reason at all why these cases should not be brought in federal court. They involve complex ques-

tions of federal law, which the federal courts are best suited to decide. In addition, although the amount in controversy for each plaintiff may be small, the total amount in issue often is millions of dollars, most of all of which are provided by the federal government. Finally, recipients may not have any remedy in state courts to enforce their federal statutory claims because of procedural and other barriers. Consequently, unless section 1331 is amended as proposed in H.R. 2202 to provide jurisdiction over these claims in federal court, there may be no remedy at all for the deliberate violation of many federal statutory rights.

We understand the reasons for joining the federal question amendment with abolition of diversity of jurisdiction in the same bill. However, because of its importance, we strongly urge the committee to consider passing the federal question amendment separately, if it becomes clear that opposition to diversity abolition will delay or threaten the entire bill.

Finally, we urge that H.R. 2202 be amended in one respect. Under section 4 of the bill as introduced, both the diversity and federal question amendments would apply only to cases filed after the date of the bill's enactment. This approach makes good sense with respect to the abolition of diversity, since it would be both unfair and unwieldy to require the transfer of diversity cases that are pending in federal court on the date of enactment. However, repeal of the amount in controversy requirement in federal question cases can and should be made applicable to all cases pending on the date of enactment. This will avoid further unnecessary litigation of the jurisdictional issue and will allow some important cases to remain in federal court that would otherwise be excluded.

3. H.R. 1046—THE MAGISTRATE ACT OF 1979

As you know, legal services attorneys have in the past opposed the Magistrate reform proposal because they fear the development of a second class judicial forum to which less popular cases, such as those involving social security claims and prisoner's rights, will be relegated. While H.R. 1046 eliminates many of these problems, there still is concern about several aspects of the bill. A written statement discussing these concerns in greater detail will be submitted to the committee in the near future.

I would like, however, to discuss an issue that has recently arisen and which bears directly on the committee's consideration of the Magistrate proposal.

Two weeks ago, Secretary of HEW Califano testified before the House Subcommittee on Social Security that he will soon propose to Congress that judicial review of HEW's factual findings in social security and SSI cases be eliminated. Since that proposal would remove beneficiaries' last line of protection against the arbitrary denial of assistance, we are strongly opposed to it.

Apart from its own demerits, the HEW proposal bears directly on H.R. 1046. As originally formulated within the Department of Justice, the Magistrate proposal was aimed expressly at social security, SSI and black lung cases. Past experience in many districts also strongly suggests that despite the revisions in the Department's original proposal by this committee, H.R. 1046 would still have its major impact in these areas. Thus, if the HEW proposal were to be passed, it would eliminate one of the principal justifications for the Magistrate bill. Because they represent alternative approaches to the same perceived problem, the two bills should be considered together and we urge the committee not to act on H.R. 1046 until it has had an opportunity to study and consider the HEW proposal.

Mr. TRISTER. I have found, really, three specific areas that I summarize briefly in my statement, and I have three points that I'd like to make today.

First is that in the past the legal services attorneys throughout the country have actively and very strongly supported the efforts of this committee to abolish diversity jurisdiction, as is done in H.R. 2202. And I'm here today simply to convey our continued support for that effort.

We have not change our position. We urge prompt and immediate action on that bill.

Second, I would like to, in a moment, speak about a part of H.R. 2202 that receives less attention, I think, than the diversity part, and talk to you for a moment about why that section is important to us,

particularly in enforcing the rights of poor people and minority people in Federal court. That is a provision that would repeal the jurisdictional amount in controversy in section 1331.

Finally, while I do not today intend to address the details of the magistrates bill, you have heard from legal services attorneys in the past on that bill.

I would like to briefly, at the conclusion of my testimony, call your attention to a recent proposal not yet even sent up to Congress by the Department of Health, Education, and Welfare, which we think bears on the magistrates proposal, and to urge you at that time to hold the magistrates proposal until you've had a chance to study this other proposal when it is sent to Congress.

With respect to diversity, the principal reasons for supporting the abolition of diversity jurisdiction by legal services attorneys is our belief that diversity cases are not appropriate, for many reasons, in the Federal courts. They do not relate to Federal issues, Federal rights, and they do, while not being the only cause of congestion in the Federal courts, they do add to it substantially, and in that way make it more difficult for Federal rights to be enforced efficiently, quickly, as they need to be in the Federal courts.

We are conscious of the problems of delay. Poor people, perhaps more often than others, when they come to Federal courts are in need of emergency relief, are in need of preliminary relief, are in need of a fast and efficient justice. And the kind of congestion that now exists in Federal courts simply interferes with those rights, and the poor people have to wait several years to get a decision on appeal, when they have to wait months, perhaps, to have a preliminary injunction hearing come on, when they have to wait to have a class action certified for many months. Those delays affect the quality of justice. They affect the rights of the poor people to a home, perhaps, to jobs, to public assistance that they need, and benefits under the many Federal urban acts.

We are deeply concerned about congestion and delay, and we are supporting the efforts of this committee and others to deal with that problem by eliminating the cases that don't need to be there.

Now, in supporting the abolition of diversity, I think we go into many, many others. With respect to the other portion of H.R. 2202, the Federal question portion of that bill, I think we're perhaps alone in pushing and believing very strongly that that portion of the bill must also be passed. There's been no opposition to it. I think it has not received very much attention.

Prof. Charles Wright previously submitted to the committee a list of areas in which the amount in controversy requirement for Federal question cases continues to be a barrier to the enforcement of Federal rights. One of the areas that he mentioned is the area that we are most concerned about. That is, cases brought on behalf of beneficiaries of Federal programs, Federal statutory programs to enforce their rights under those programs.

Because of some quirks and technicalities having to do with the language of certain civil rights statutes and other jurisdictional statutes, it is difficult in some circuits today to bring those cases. It is impossible in some cases. And the result is the cases which involve complex Federal questions, that involve perhaps sometimes millions

of dollars of Federal aid, nevertheless, cannot be decided in the Federal court.

In some situations, there is at least a theoretical remedy still available in the State courts. More often than not, those remedies are theoretical. In some States they don't exist at all. The result is, even where the States are plainly violating Federal policies and Federal statutory and regulatory requirements, there is no remedy for these beneficiaries.

The amendment which is included in section 2 of H.R. 2202 would cure that problem for us. And we would like to stress the importance of that to this bill. In that connection, I'd like to simply make two related points to that aspect of the bill.

The first is that, because we regard that section as so important independently of the abolition of diversity, we would urge the committee to consider that if, at any time in the course of the day or in the course of consideration of H.R. 2202, it becomes clear that there may be great delay or a need that the whole bill has been threatened because of opposition to the diversity portions of the bill, that the committee would consider passing the Federal question aspects of it separately.

We understand that there are very good reasons for keeping the two together and putting them in the same bill, and we don't oppose that now. But if at some point the opposition becomes so fierce to the diversity bill and it looks like that bill may be delayed, we would urge that there be separate consideration of the Federal questions bill. It's an important part of that bill independent of diversity, and it really deserves special attention, if that should become necessary.

Mr. KASTENMEIER. That would have the effect, however, of increasing cases that impact on the Federal courts without the concurrent effect of terminating or curtailing diversity jurisdiction?

Mr. TRISTER. Mr. Chairman, I believe all the information that this committee has heard in the past, however, is that the increase would be slight. I believe in hearings a few years ago, Mr. Spaniol from the Administrative Office of Courts testified that they didn't even keep separate statistics because the numbers were so few. And Professor Wright, when he testified, also stated that the number was quite insubstantial.

So that while these cases are important, they involve large amounts of money and so on, statistically, I think that they would not add so many cases to the Federal docket that that would be a reason to only do it if we could cut out other cases.

I think all of the evidence indicates that we're talking about a very small number of cases.

The other point I wanted to make with respect to the Federal question aspect of the bill has to do with the effective date of that portion of the bill. Section 4 of H.R. 2202 makes both aspects of this bill effective as to cases that are filed after the date of enactment. That is to say, the bill would not be effective with respect to pending cases.

Now, I understand and concur with the decision not to make the abolition of diversity apply to pending cases, because that would mean taking pending cases out of the courts. And I think that would be unfair to the litigants, it would be unwieldy and so on.

But as to the Federal question aspect of the bill, there we have just the opposite. We have cases that are in court which this bill would allow to stay in court. And as to that part of the bill, we would urge that the effective date—that the bill be made effective as to all cases pending on the date of enactment. That number would be, I think, an even smaller portion of the cases I just mentioned, a very, very few cases. But it would avoid further litigation of these issues, a further recourse in both courts and parties in being allocated to continue to litigate these issues many years, in some cases, after this committee will have passed the bill.

It really does not make any sense, we think, to continue to litigate that issue in pending cases after Congress repeals that requirement.

In connection—something I did not mention in my written testimony—in 1976, when this committee partially abolished the \$10,000 amount in controversy requirement in cases against Federal defendants, that action was made applicable to pending cases. So that there is a precedent, if you will, for giving the same treatment in this situation.

I think it would simply be a matter of treating two parts of this bill differently as to the effective date. Now—

MR. KASTENMEIER. I really hadn't thought of that. Would it not possibly affect some of the litigating parties in these cases, to find that all of a sudden their cases would be in Federal court rather than, say, in the State court, because of the little or because of the relatively small amount in controversy?

MR. TRISTER. No, sir, perhaps, I misspoke. I did not mean to make this bill effective as to any case previously filed in State courts so it could not be brought into the Federal court. All I meant to say was a case that is now in Federal court—pending in Federal court—should remain there without having to litigate the jurisdictional question any further. I did not mean to suggest that a case brought in State court would then shift gear. I think that would present terrible drafting problems.

MR. KASTENMEIER. Do you want to conclude?

MR. TRISTER. Finally, in connection with the magistrate bill, H.R. 1046, the legal services around the country have had some problems, I think, philosophically and practically both, with the bill. And they have sent you written statements and testimony in the past.

I have been told that there will be further written statements submitted to the committee this year in that regard. The issues I'd like to address today have to do with a proposal which has been made public by Secretary Califano of HEW 2 weeks ago when he testified before the Social Security Subcommittee of the House Ways and Means Committee. At that time, he indicated that the administration, his Department, was considering a proposal to eliminate judicial review of the Secretary's factual findings in social security cases and in SSI cases. It did not eliminate judicial review entirely, but only as to the factual cases.

We have learned subsequently that that proposal will be sent up by the administration in a matter of days as part of a social security disability package.

My reason for mentioning this is we strongly oppose that and will be, hopefully, communicating with your committee in great detail

about that proposal when it's sent up. We regard it as a major threat to the rights of beneficiaries to get the benefits they're entitled to under the social security and SSI programs.

My reason for mentioning it today, however, has to do with the relationship between that bill and the magistrates bill. As originally proposed, the magistrates was in the Justice Department and drafted in the Justice Department. The magistrates proposal focused expressly on SSI and social security cases.

That was one of the areas that was identified for the magistrates proposal. It was hoped that the magistrates proposal would help take some of these cases out of the hands of the judges and give an alternative forum for them. While the structure of that proposal has changed dramatically in this committee, we think that, based on prior experience, the major impact of the magistrates proposal will still be in the social security and SSI area. And yet, if this HEW proposal were to come to Congress in the form we now understand it to be in and if in fact it was passed, we think that a major—it would eliminate all of these cases entirely from the courts.

In that respect, the need for the magistrates bill, I think, would be changed tremendously. And we therefore are asking the committee to hold off on the magistrates bill until you've had a chance to see the social security proposals and see the extent to which they relate to each other.

That's all I have.

Mr. KASTENMEIER. Thank you very much, Mr. Trister, for your testimony. I commend you for your comments.

I have, before yielding to the gentleman from California, just have one question I want to ask on the last issue. It's not clear to me why the proposals cannot stand on their own feet. That is to say, as you have conceded, the present magistrates bill does not categorize matters over which the magistrate will exercise the jurisdiction of the district court. Those poor persons in matters such as social security, et cetera, are not relegated to magistrates. That is clear in our bill.

Secretary Califano's proposal notwithstanding, I don't really see why the magistrates bill should be held hostage to the Social Security bill's future consideration and disposition. It's an entirely different matter.

Mr. TRISTER. My point, Mr. Chairman, is that despite the fact that the bill has been made consensual and has dropped the categories as they originally were proposed, we believe that the proposal as your committee passed it last year would nevertheless have a major impact on the social security and SSI areas. And as a practical matter, we believe that really for two reasons.

The first is that in the past it has been in the social security and SSI area that magistrates have been used frequently. We expect that that practice will continue, that despite the fact that this committee doesn't categorize, we anticipate that judges will in fact do that. They will in fact—local district courts will in fact look at this bill as an opportunity to deal with this category of cases.

The second point has to do with the fact that, while the consent is required under your bill, we are fearful, I think, and have, I think, good reason to fear this, that the Government would adopt the blanket consent in this case. They will simply adopt the policy across the board

of saying, we will consent. When they announce that and make it public, every district judge in the country is going to know who didn't consent if a case is brought before them. And there are all kinds of subtle and I don't mean to suggest illegal or devious ways, but there are pressures that can be brought to bear. So that we expect that if the Government does take this position in this category of cases or in others, there will be pressures brought to bear, indirect and so on, that will force these cases into the magistrates jurisdiction.

And if our fears and our perceptions are correct, that this bill will in fact be a bill that is largely, certainly not exclusively but largely, deals in this area, then the possibility that that area may be eliminated entirely suggests to us that this bill ought to be reconsidered in light of that possibility.

Mr. KASTENMEIER. Mr. Trister, I may be mistaken, but I take it you and your organization have misgivings about Secretary Califano's proposal, do you not?

Mr. TRISTER. Indeed, yes.

Mr. KASTENMEIER. In that event, if we were to embrace a magistrates bill to give ample evidence that there's sufficient judicial capacity to treat these cases, that would provide an important alternative to the Secretary's proposal to administratively dispose of social security factual disability claims?

Mr. TRISTER. I think, Mr. Chairman, if we have the choice between the two in front of us, we would clearly favor this approach, because it does retain the judicial system as a backstop to administrative arbitrariness. What we're afraid of if this bill is passed: First, we won't get that choice, we'll get the magistrates bill, which we have misgivings in that area about, as well as other areas. So we think they ought to be looked at as an either/or thing.

If we're faced with that choice, I think, without trying to anticipate what my colleagues would say, I think we would come down in favor of that choice. The risk we have now is that because of the timing of this, is that we are offered this one, when there is the risk yet that we'll get the other one as well. And that's the problems we have.

That's why we'd like to see them dealt with together.

Mr. KASTENMEIER. I'd like to yield to the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I only have a couple of questions. They deal with the diversity question.

We have about 398 Federal judges now. I understand from Judge Bell yesterday he has 170 appointments to make. So if the Federal courts are crowded, they shouldn't be nearly so crowded 6 months or 1 year from now. We hear about jurisdictions such as Chicago and other major Eastern State courts where there is a tremendous crowd in the courts, and some jurisdictions where you might have to wait 6 years.

Is there any major reason for that other than the crowding of the courts that would require us to do away with the diversity of citizenship hearings?

Mr. TRISTER. Mr. Moorhead, several responses.

I think, with respect to the crowding question, I think that while indeed the new judgeships will ease the pressure, I believe that all the statistical analysis that this committee has heard strongly suggests that that will be a temporary short-run answer.

In the long run, we will be faced with very, very serious congestion problems, despite the additional judges.

Now, with respect to State court congestion, it is true that there is serious congestion. One response that I make for that, I think, is that perhaps the requested transfer of these cases into the State courts will add to those groups and those constituencies who have an interest in alleviating and improving the State court system. We would hope that is true.

Legal Services attorneys, as I'm sure you're aware, throughout the country do the bulk of their practice in State courts, and they have a great say in the improvement of State civil procedures. And we would welcome, if you like, the additional support in trying to get reforms in the State areas that will alleviate delay there.

Now, with respect to other reasons, I think apart from congestion, arguments have been made to this committee, in which I certainly concur, that there is no obvious reason why there is any expertise in the State courts—Federal courts, rather, in diversity cases are called upon to answer questions that they have no background in, often. They are called upon to predict the course of State law in a way which, from the reported opinions, certainly seems to leave the judges uncomfortable, seems to engage them in tasks that they're not suited to.

I think those are additional reasons for eliminating those cases, quite apart from congestion, although from our standpoint the congestion is the most compelling need.

Mr. MOORHEAD. I understand certain types of cases, however, that might come up very rarely, especially in the smaller rural State. But even in some of the larger States that have gravitated to the Federal courts, where they have assigned it to judges that become almost experts on particular fields, there can be civil rights matters which also affect State jurisdiction and State law, as well as cases dealing with large business and laws that the States have for the protection of business competition.

And if we did this, they might have to be filed in small jurisdictions of the States, where they've never seen that kind of case and really don't understand them.

Mr. TRISTER. I'm not quite sure how to respond. I'm not familiar with the areas that you have in mind.

I do, and have done for many years, considerable amounts of civil rights litigation, and I can't think of any in that area that you had in mind.

In the other areas, it's a bit beyond my personal experience and I don't know if I have a response.

Mr. MOORHEAD. I guess the other large question comes up, of course, in the Federal courts which are basically located in the population centers. You'd get a more worldly jury or one that is broader-based, than what you would get in some of the rural counties. Railroads might go through rural counties and be involved in things there. The other major business concerns might have accidents in small counties. They would have much more confidence in having their cases tried before the Federal court than they would where you might get a home town decision.

I know that's one of the arguments that the California Bar Association gives against this legislation. I know the bar associations of many States have basically the same point of view.

What would your comments be on that?

Mr. TRISTER. Well, I'm not unsympathetic to the notion of biased judicial circumstances. I practice law, I think, under those circumstances where the bias resulting from other situations was quite considerable.

I suppose the question I have—and I'm probably not the right person to ask—I really don't know the extent to which it is there, how strong it is, how real it is and how prevalent it is. And that's one response.

Another is, I wonder whether it's unique to this sort of problem. I did practice in Mississippi for a number of years, and there there was a local bias from county to county. If you came from two counties over, you were a stranger in that county and people talked about it and they knew about it and they knew your license plates, and so on. And it affected the whole system.

Nobody suggests to those cases that those cases ought to be in Federal courts.

Mr. MOORHEAD. We'll never alleviate all of those problems, but will this legislation make the administration of justice better or will it not?

Mr. TRISTER. Well, I think all I'm suggesting is that it's a problem and as a problem, I doubt seriously that it's sufficiently compelling to override the other problems that we have. There's obviously an argument there. I think that the other problems, particularly congestion and the fact that we've got to face up to the overload problem of the Federal courts and what it does to the enforcement of rights that nobody questions ought to be in Federal courts. They're Federal rights that are, as this committee said in its report last year, for which the Federal courts are best suited to do that job. Nobody debates that.

We've had a start from there, and yet, we have an area that is at least questionable: in my view, even more than questionable.

And possibly this side effect is simply not, in my view, sufficient to override these other concerns.

Mr. KASTENMEIER. The gentleman from California?

Mr. MATSUI. Thank you, Mr. Chairman.

Mr. Trister, let me approach it this way. I read the ACLU's comments in last year's testimony, and basically, they say the same thing you do regarding poorer minority persons not having access to the Federal courts because of the clogging that occurs with diversity.

Now, one of the arguments made by the trial attorneys bar advises the reverse argument, in other words, that at times minorities and poorer and those people that you or the ACLU perhaps traditionally represent have a need for diversity jurisdiction in order to make sure they have a choice of trial forum. I think that's the same argument Mr. Moorhead is making.

You say there might not be enough bias. You're talking about bias against minorities and the poor as relates to diversity cases, I imagine. Could you comment on their position?

Mr. TRISTER. At the time that this bill began to be debated in the last Congress, early in 1977, as some of us associated with Legal Services started to work on it, we asked the research institute, the Legal Research Corporation, to do some research for us and find out the extent to which Legal Services lawyers were in fact using diversity.

And it's quite unscientific an example and so on, but all the indications are that Legal Services attorneys are not using this; in very, very few instances. The one survey found out, of several hundred cases reported in 1976 that were brought by Legal Services programs, only five were diversity cases.

Mr. MATSUI. OK. But that's of the organized groups that handle these things. What about the plaintiff's attorney that represents a black railroad worker, something like that? You may not have statistics in those situations, do you?

Mr. TRISTER. No, I'm sure we do not. All I can respond to that is, when we did find Legal Service attorneys who have brought these cases and have relied on diversity, in a few instances, we said to them, now, you're faced with a choice, an option of eliminating entirely or preserving it through those instances where you felt you need it. They came down with abolition. They said that the other policies are so great, the fact that in any individual instance it may be to the benefit of a particular individual is not sufficient to deal—not deal with a very systematic endemic program.

They all operated uniformly. We had some lawyers that worked particularly for migrants. As you would imagine, they did run into some diversity situations more than others.

Also, in testimony before the Senate Judiciary Committee last year, an attorney from Arizona related his comments as an attorney for the Indians for the Four Corners area. They have run to multistate organizations. In each instance, the lawyers said yes, it's there, we like it, we wish to use it occasionally; given the other problems, we would certainly opt for abolition.

I think that's the only response I can give you. There's no question we can find an individual here or there for whom it is to their benefit. I think we've got to look beyond those cases.

Mr. MATSUI. The other issue you'll have to educate me on is, because I wasn't here last year, is the magistrates bill. I did not realize that the bill was primarily for social security and black lung cases. Is that your theory of the bill? Where do you get this understanding from?

Mr. TRISTER. Let me be very precise about that. As the chairman pointed out, the present bill does not single out any category, and I do not mean to suggest that it does. That is, in our view, an improvement over the initial proposals. As originally drafted within the Justice Department, they did identify particular categories of cases.

What I responded to the Chairman earlier about our concerns with the magistrates bill is that we anticipate that, despite the fact that social security cases are not singled out in the bill, the practice will nevertheless result in very great pressure on that category of cases going into being shunted off to the magistrates, if you will. And the reasons, as I explained, for our fears in that area are:

One, in the past many district courts have already identified the social security area as one for magistrate jurisdiction. The case has gone to the Supreme Court on that very question and was sustained in the *Weber* case, that courts could use the existing magistrates proposal's provisions to assign social security cases to the magistrates. So that it's that prior experience, if you like, that says to us this is going to be a major area in which courts will use this new procedure offered them.

The second, as I said, is our fear that the Government nationally or individual U.S. attorneys, if there isn't a national policy, will adopt a blanket consent. They will announce simply that all social security or SSI cases, the Government is prepared to go to the magistrates. Now, if that's true, there can only be one other party that won't consent. That's the plaintiff's counsel. And in that situation, we anticipate a lot of pressures that will be brought to bear or felt to be brought to bear, real or imagined, on the plaintiff's counsel to also consent. And these cases will also be gone.

That's all I have.

Mr. MATSUI. Thank you.

Mr. KASTENMEIER. Do the gentleman from Michigan or the gentleman from Illinois have questions?

Mr. MIKVA. No questions.

Mr. KASTENMEIER. Thank you very much, Mr. Trister, for your testimony today. We appreciate your appearance and your help in both these matters.

We will now go to our main witness today, a gentleman who I am very pleased to greet again. He has been very patient.

We'd like to introduce our primary witness, a nationally recognized expert on the subject of magistrates and diversity, and indeed the whole area of improving the administration of justice.

He is the Honorable Dan Meador, the Assistant Attorney General of the United States.

Mr. Meador?

TESTIMONY OF HON. DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY STEPHEN BERRY, ESQ., AND W. R. KING, ESQ.

Mr. MEADOR. Thank you, Mr. Chairman. It is a privilege to be here to testify on behalf of the Department of Justice in support of H.R. 1046 and H.R. 2202.

Accompanying me today are Mr. Stephen Berry and Mr. W. R. King, attorneys in the Office for Improvements in the Administration of Justice. We have worked extensively on these proposals all through the 95th Congress and through the early days of this Congress with this committee and the Senate committee, and I have filed a written statement which I would like to ask to be submitted into the record at this time.

Mr. KASTENMEIER. Without opposition, your 28-page statement, together with its appendix, will be received and made part of the record.

[The prepared statement follows:]

TESTIMONY OF DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before this Subcommittee in support of H.R. 2202 which would eliminate the general diversity of citizenship jurisdiction in the federal courts, and H.R. 1046 which expands the jurisdiction of United States magistrates. I wish to thank the Subcommittee for considering these bills so rapidly.

DIVERSITY OF CITIZENSHIP JURISDICTION

With the passage of the first Judiciary Act nearly two centuries ago, the federal trial courts were granted original jurisdiction in some cases between

citizens of different states. The major historical justification for this jurisdiction was the apprehension that state courts would be prejudiced against out-of-state litigants. It was believed that if such prejudice existed, it would deter interstate travel and commerce, and thus hinder national expansion.

The continuing need for diversity jurisdiction has been the subject of debate for decades. In recent years there has been a renewed effort to amend or repeal the diversity statutes, an effort that has won broad support within most segments of the legal community. The focus of the debate has been on the question how best to amend the diversity statutes. The bills considered in this and past Congresses range from the very modest proposal to raise the jurisdictional amount to proposals to abolish completely all of the diversity jurisdiction.

During the last Congress, the Department of Justice proposed legislation that would deny a plaintiff the opportunity to invoke diversity of citizenship jurisdiction in his home state. Federal law has long recognized the lack of justification for permitting a resident defendant to invoke the federal diversity jurisdiction in his home state; such defendants are prevented from removing cases brought against them in their own state courts, 28 U.S.C. § 1441(b). It was our view that resident plaintiffs should be treated equally and that they likewise should be required to use their state courts when suing in their home states. The House of Representatives determined, however, that the time was right for complete abolition of the general diversity jurisdiction, and it passed a measure that would accomplish that result (H.R. 9622); interpleader jurisdiction in diversity cases, under 28 U.S.C. § 1335, was left intact. We noted at that time that although we continued to adhere to the position set forth in our own proposal, we had "no problem in supporting H.R. 9622 as well." Since the passage of H.R. 9622 by this body, we have continued to evaluate the various proposals in light of other information that has become available. We have concluded that the action taken by the House in the last Congress is a sound approach. Accordingly, we endorse H.R. 2202.

We have reached that decision for a variety of reasons. One of the most important is the immediate and quite real effect of diversity cases on the problem of federal district court congestion. The number of civil filings in our district courts has doubled in the past 15 years, and the increase in the number of diversity cases has for several years accounted for approximately 23 percent of civil case filings. There is little evidence that, absent jurisdictional modifications, this trend will be checked or reversed.

At the Chairman's request, we are in the process of attempting to determine with some degree of specificity "the cost of diversity cases to the Federal judicial system and the amount of time expended on these cases."¹ We are hopeful that our study will be completed shortly, and we will provide the results to the Subcommittee as soon as they are available. (See Appendix). Some preliminary information is presently available, however.

The data show that diversity cases, as opposed to civil cases in general, are likely to remain in the system for longer periods of time, to require more pretrial proceedings, to go to trial rather than to be settled, and by an overwhelming number to require a jury trial. During fiscal year 1978, for example, 25 percent of the civil cases terminated in the district courts were diversity cases. Yet diversity cases accounted for only 13 percent of the civil cases terminated prior to pretrial. On the other hand, of the civil cases terminated after pretrial, 43 percent were diversity cases. Further, 39 percent of the cases that went to trial and 64 percent of the civil jury trials were diversity cases.

Twelve percent of all diversity cases were terminated by a trial—a rate twice that for all other civil cases. Based on these data, it seems clear that diversity of citizenship cases occupy the time and resources of the federal judiciary out of proportion to their numbers.

Further evidence of the burdens and difficulties cast upon the federal courts by diversity cases can be found in a study recently completed by Professor Thomas D. Rowe, Jr., of the Duke Law School under a contract from the Department's Office for Improvements in the Administration of Justice. This study examines some of the non-obvious effects of diversity cases—effects that would disappear entirely from the federal judicial system if the cases were filed in a state court. As Professor Rowe notes, federal judges must spend considerable time determining the actual state citizenship of the parties, attempting to identify

¹ Letter to Patricia Wald, Assistant Attorney General, Office of Legislative Affairs, from Representative Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Jan. 15, 1979.

manipulation or collusion designed to invoke or defeat federal diversity jurisdiction, determining the proper alignments of parties, sorting out the jurisdictional problems encountered by party joinder and intervention, and dealing with the troublesome separate-claim removal provision (28 U.S.C. § 1441(c)). The study makes a convincing case for the abolition of the general diversity jurisdiction. It is scheduled for publication in the March 1979 issue of the Harvard Law Review.

The creation of 152 new judgeships under the Omnibus Judgeship Act² has led some persons to suggest that the federal courts will be in a better position to handle their caseloads and that this removes the need to curtail the diversity jurisdiction. But that view is illusory, and the new judgeships do not diminish the desirability of placing the diversity cases in the state courts.

In 1970, the last time additional judges were authorized, the average civil filing per district judgeship (401 judgeships) was 218 cases—a number that was then considered to be manageable. By 1978, the number of civil filings per judgeship had increased by nearly 60% to 348 filings per judgeship. Projections for 1989 indicate that, even with 117 new district judges, the number of civil filings will be in excess of 280 cases per authorized judgeship—nearly 30% more than was the case in 1970.

The history of growth in federal dockets, together with contemporary conditions in American society, strongly indicate that case filings in the federal district courts will continue to increase, as they have for each of the past 15 years. Moreover, the Speedy Trial Act of 1974 requires judges in many districts to devote increased time to criminal cases, thereby causing backlogs and delays in civil cases. Unless other steps are taken promptly, it is likely that even with the new judges, the federal dockets will again, within a few years, be back in the unmanageable conditions of recent years. Congress would again face pressures to create still more judgeships. The only way to prevent that course of events is to adopt measures such as the curtailment of the diversity jurisdiction and the enlargement of magistrate's jurisdiction to enable the judiciary to handle its business more effectively.

The effect on federal judicial business is not, however, the only reason to amend the diversity statutes. Diversity suits are cases which involve state law only. Under *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938), federal judges cannot give authoritative interpretations of state law. Moreover, in a federal system such as ours, state law cases ought to be tried in state courts.³ To allow these cases to remain in the federal courts should require some overriding justification.

The elimination of these cases from the federal courts would not have an appreciable adverse effect on the state courts. A recent article in the *State Court Journal* points out that the states would experience an average of 1.03-percent increase in civil filings if federal diversity jurisdiction is abolished.⁴ Some states would be affected more than others, and a few might have to increase the number of trial judges in some localities. For the vast majority of the states, however, abolition of diversity will have little or no effect on state judicial business.

Further evidence that the elimination of the federal diversity jurisdiction would pose no serious problems for the state courts can be found in the position taken by the Conference of Chief Justices. This Conference is composed of the Chief Justices of all the fifty states. At its meeting in August 1977, the Conference adopted the following resolution:

Our state court systems are able and willing to provide needed relief to the federal court system in such areas as:

* * * * *

The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts.

² Public Law No. 95-486.

³ As an example of the problems encountered by the existence of diversity jurisdiction can be found in *Ann Arbor Trust Company v. North American Company*, 527 F. 2d 526 (6th Cir. 1975), cert. denied, 425 U.S. 993 (1976). There the district court was called upon to interpret a suicide clause in a life insurance policy. The question was governed by state law. Four policies were litigated in the district court under diversity jurisdiction, while five other policies were litigated in the state court because diversity was lacking. Since the issue involved was a novel one, the district court was forced to make an "educated guess" concerning the proper interpretation of state law. The court of appeals felt obliged to remand the case with instructions that the case be retained on the district court docket until an authoritative decision was rendered by the State Supreme Court. It is clear that the difficulties encountered by the two federal courts in this case were solely the product of diversity jurisdiction. The case involve state law only and, accordingly, should have been litigated in a state court.

⁴ Flango & Blair, "The Relative Impact of Diversity Cases on State Trial Courts," *State Court Journal* 20 (Summer 1978).

This and the above statistics provide an effective answer to any argument that withdrawal of federal diversity jurisdiction will create unmanageable difficulties for the state courts.

When the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice conducted hearings on this subject during the last Congress, it heard testimony or received statements from some two dozen witnesses representing the bench, the bar, academia, the Department of Justice, and several public interest groups. All except two supported either complete abolition or substantial curtailment of diversity jurisdiction.

The arguments in opposition can be summarized as follows: (1) a choice of forum is an important right which should be preserved; (2) the federal courts administer a higher quality of justice than the state courts; (3) diversity jurisdiction provides a worthwhile means of exchanging ideas and procedures between state and federal courts, while (4) abolition would create a specialized bar; and (5) out-of-state litigants will be the victim of bias and prejudice at the hands of state courts.

The arguments are neither new nor do they withstand close scrutiny. Both Judge Henry Friendly and Professor Charles A. Wright in their testimony before this Subcommittee considered some or all of these arguments and demonstrated how lacking in substance they are. With respect to the interplay between the two systems, Judge Friendly noted, and I agree, that the growth of federal litigation insures that lawyers of every sort will increasingly find themselves in federal court without the aid of diversity jurisdiction. Indeed, abolition or curtailment of diversity jurisdiction will undoubtedly cause those attorneys who have previously confined their practice to federal court to appear more frequently in state court or else lose their clients.

Equally without merit is the notion that a litigant has some fundamental right to a choice of forum. Even under current law, there is no choice except by accident of geography. Further, as Judge Friendly has noted, the "federal courts were intended from the outset to be courts of severely limited jurisdiction; lawyers and clients are not entitled to go there unless there is some good reason why a federal court should hear the case."

The only other reasons to retain diversity jurisdiction are the feeling that somehow the quality of justice in the federal courts is superior to that available in state courts and the alleged bias against out-of-state litigants. Arguments over whether the federal courts are better than the state courts, or vice versa, are unrewarding and inconclusive. The real question is whether the state courts administer an inferior or inadequate brand of justice in cases resting on state law where there are parties from different states. The answer is that the state courts decide a large number of cases of that sort as a matter of routine, and they have done so for many years in a sound and fair manner. Many of these cases involve less than \$10,000, and consequently they cannot gain access to the federal courts. However, many other cases involving more than \$10,000, with citizens of different states as opposing parties, are filed in the state courts and are not removed to the federal courts.

The quality of the state courts and of state judicial personnel has improved markedly in the last twenty years. This has resulted from a number of developments, including the following:

The rapid growth of judicial education. The concept of continuing professional education for judges was almost non-existent until the last two decades. Since that time, the National Judicial College has been created. It offers numerous short courses of one or two weeks as well as month-long courses, principally for state trial judges. Through these courses, the College presents educational programs to approximately 2,500 state judges annually. Furthermore, some 8,798 state trial judges of general jurisdiction have completed the full month-long resident course at the College. In addition to the College, there are numerous other educational programs for state judges, including numerous short courses, covering subject matter that is both generalized and specialized, offered by the American Academy of Judicial Education. A number of states have their own judicial colleges or offer special short courses for their judges. As a result, most state judges participate in periodic educational programs.

Improved quality of state judges. The first state adopted a merit selection process for judges through judicial nominating commissions in 1940. Today, nominating commissions with statewide merit selection procedures for some or all state judges exist in about 25 states. To these improved selection procedures, one must add the fact that the overall quality of legal education in the United States has improved substantially in the last twenty years. Thus, increas-

ingly, persons appointed to the state courts possess sound formal educational backgrounds and solid career experience.

Improved procedures in state courts. At least 30 states today have rules of procedure that are substantially identical to the Federal Rules of Civil Procedure. Furthermore, over the last two decades, bar associations, law schools, and other groups have given increased attention to reforms in state court procedures.

Improved court management. The movement toward effective court administration and court management has blossomed within the last two decades. In the period shortly after the close of the Second World War, very few states had effective statewide systems of court administration. Yet today, most states have offices of management or administration, staffed by trained professionals. In addition, there is now an Institute for Court Management, established in 1970, which continually trains professionals to enter court administrative offices.

The National Center for State Courts. This national center was created in 1971 to provide a wide variety of services to the courts of the 50 state systems. It is an informational clearing house for developments and improvements in all court systems. In addition, it provides technical assistance to the courts of the states, and conducts research in state court problems. A permanent headquarters building for the Center was dedicated in Williamsburg in March 1978, and it is likely that this organization will provide increasing benefits to the state courts and an increasing array of services to the state courts. This in turn will enhance the quality of the state courts at all levels.

Federal funding and miscellaneous other assistance. Ten years ago, no federal funds flowed to the courts of the states. Since that time, at least \$229 million of federal funds have gone directly to these courts or have flowed indirectly to the state courts. Most of this funding has come through the Law Enforcement Assistance Administration. These funds have provided assistance to the state courts in developing new procedures, in restructuring and reorganizing themselves, in training personnel, in improving court technology, in conducting research to improve state court processes, and in a variety of other ways.

The Department of Justice supports federal funding for the benefit of the state courts at least at the present levels. Collectively, these developments mean that the judicial systems of the states today are far different from those that existed as recently as twenty years ago. Impressions of the state courts, and historical assumptions about the state courts that made comparisons to the federal courts, are increasingly inaccurate. Today state courts are better financed, better organized, and better administered than they have been at any time in the past. Moreover, their personnel, both judicial and administrative, are of far higher quality than ever before. All indications are that movement in this direction is almost certain to continue and that we may count on an ever-higher quality of justice through the courts of the states. There need be no fear that litigants of diverse citizenship in civil cases will, on the whole, get any reduced quality of justice, by reason of their diverse citizenship than they would get in the federal district courts.

As to the bias argument, Professor Wright noted in his testimony, it is "doubtful in the extreme that prejudice against a person because he is from another state is any longer a significant factor." In fact, differences between state and federal courts sitting in the same state are less today than they were some years ago. Juries today in the federal district courts and in state trial courts of general jurisdiction are drawn largely from the same population pools and include the same types of persons. Further, in any given state, the state and federal trial judges have typically been the product of the same state law system. As Judge Elmo Hunter remarked last year at the Williamsburg seminar: "It is strange to me as one who has been a state court judge for 13½ years and one who has sat on all the courts of record of his state . . . that I have been susceptible of such prejudice then but have been purged of it for the twelve years I have been a federal judge."

Thus, in juries, procedures, and judges the federal and state courts sitting in the same geographical territory do not, in general, differ as much as perhaps they once did, and a federal district court is unlikely to afford substantially different treatment for litigants in state law cases.

The kinds of prejudice which may exist do not derive ordinarily from the fact that a party has a state citizenship different from that of the opposing party. In over 75% of the diversity cases, one or both of the opposing parties is a corporation. Prejudice, if it exists at all, is likely to be directed to the corporate party simply because of its nature irrespective of whether it is a home state or

out-of-state litigant. In suits between individuals, the bulk of the cases are personal injury actions where the jury knows the real defendant is almost certain to be an insurer; any prejudice will stem from that factor and will exist in equal measure in federal court.⁵

We endorse the retention of the interpleader jurisdiction under 28 U.S.C. § 1335. That use of the diversity jurisdiction continues to have substantial practical benefits by permitting disputes with widely scattered claimants to be litigated in one forum. This avoids a multiplicity of actions with possible conflicting results.

H.R. 2202 also eliminates the jurisdictional amount from 28 U.S.C. § 1331, thereby removing that monetary requirement from all federal question cases with the exception of those brought pursuant to the Consumer Product Safety Act. We also support that change. We estimate that this amendment would cause only a very slight increase in the number of cases filed in the federal courts because most federal question cases already come into the federal courts under jurisdictional statutes that do not require any monetary amount.

The likelihood that any increase in federal caseloads, resulting from the elimination of the jurisdictional amount, will be slight is reinforced by an examination of the effects of previous jurisdictional amount changes. In 1958 the jurisdictional amount was increased from \$3,000 to \$10,000 for both diversity and federal question cases. With respect to diversity cases, the change had the apparent effect of decreasing filings the following year by over 30%. On the other hand, the federal question filings decreased by less than one percent. We conclude from this that the number of federal question cases affected by the jurisdictional amount in 28 U.S.C. § 1331 is no more than a handful. With respect to those few cases, we believe that there should be no price on entrance to the federal courts for a case that arises under the Constitution, laws, or treaties of the United States.

MAGISTRATES JURISDICTION

Turning now to the jurisdiction of federal magistrates, by way of introduction let me say that numerous Anglo-American courts have developed a means of supplementing judicial manpower at the trial level. In the United States a commissioner system in the federal judiciary existed almost from the foundation of our country, with only minor changes until the system was upgraded by the Federal Magistrates Act of 1968 (28 U.S.C. §§ 631-639, as amended (1976)). After the magistrate system had become fully operational in the federal district courts in 1971, it became clear that the vague jurisdictional language of the 1968 Act was producing differing interpretations of the possible scope of a magistrate's responsibility. It is the purpose of the proposed Magistrate Act of 1979 to clarify more precisely and to enlarge somewhat the jurisdiction of federal magistrates and to improve access to the federal courts for the American public.

The proposed Magistrate Act of 1979, H.R. 1046, is the product of close cooperation on similar legislation during the Ninety-fifth Congress between this Subcommittee and its staff and my Office. In developing the bill that was introduced in the last Congress, we also worked with the Senate Subcommittee on Improvements in Judicial Machinery, the Magistrate Division of the Administrative Office of the U.S. Courts, and many private groups.

Indeed, the Department of Justice has made every effort to consult with parties who have an interest and expertise in this area. The bill last Congress was developed after consultation with many groups, and the concepts were approved by the American College of Trial Lawyers and the House of Delegates of the American Bar Association. In addition, this Subcommittee and its Senate counterpart developed an extensive hearing record. The bill passed both Houses in the last Congress but did not emerge from the Conference Committee.

The magistrate system is a sophisticated, flexible judicial resource that is designed to cope with the varied and everchanging conditions of our district courts. Because magistrates have limited tenure and function as part of the district court rather than as a separate tribunal, the system provides supplementary judicial manpower that can be increased or taken away as docket needs fluctuate from district to district and year to year. No district court is compelled to use magistrates. The proposed bill continues the voluntary nature of the system, for magistrates would be used only as the bench and bar desire, only in cases where they are considered by all actors to be competent.

⁵ Friendly, "Federal Jurisdiction: A General View" 148 (1972).

The bill enlarges and defines more precisely the civil and criminal jurisdiction of federal magistrates. It gives magistrates, for the first time, explicit statutory authority to enter dispositive judgments in civil cases, subject to consent by all parties to the exercise of such power by the magistrate. This measure will speed the delivery of justice and improve the courts' ability to respond promptly in resolving disputes, thereby reducing delay and expense. The bill does not affect the existing power of magistrates in the civil pretrial area. The proposed Magistrate Act of 1979 also expands the criminal trial jurisdiction of magistrates to include any misdemeanor prosecuted in Federal district court, that is, any offense for which the maximum term of imprisonment that may be imposed does not exceed one year, regardless of the amount of fine that may be imposed. Presently magistrates may hear with the consent of the defendant minor offenses which involve sentences that do not exceed 1 year or maximum fines of not over \$1,000. The bill also establishes more demanding appointment standards for magistrates in an effort to assure a high quality of judicial personnel.

Attached to this testimony is a section-by-section analysis of technical differences between H.R. 1046 and S. 237, the versions of the bill that have been introduced this session in the Senate. Furthermore, technical aspects of the bills passed in the last Congress discussed in reports by both the Senate and House Judiciary Committees. H.R. Rep. No. 95-1364, 95th Cong., 2d Sess. (1978) ; S. Rep. No. 318, 95th Cong., 1st Sess. (1977). Also at your disposal are constitutional and budget analyses, as well as briefing material, prepared by my Office.

In view of this large amount of information already available to the Subcommittee, I will confine my testimony here to a few key aspects of the legislation. These concern the qualifications of magistrates, consensual civil jurisdiction, procedures for appeal in civil cases, and the constitutionality of the bill.

Qualifications of magistrates

Magistrates are judicial officers of the district courts; as such, they must be persons of uniformly high capacity and competence. When most of the magistrates now in office were appointed around 1971, their responsibilities were unclear. As a result, appointment standards fluctuated widely, and there is at present an unevenness in the ability of magistrates to perform their tasks. Because magistrates serve for a term of 8 years, most of them are eligible for reappointment this year. The quality of magistrates is therefore of imminent concern.

H.R. 1046 and S. 237 address the matter of qualifications of magistrates somewhat differently. Both bills require public notice of all vacancies in magistrate positions. The House bill establishes an elaborate and careful merit selection procedure that applies to both full and part-time magistrates. It mandates a Magistrate Selection Panel, to be established in each district by the district court and composed of residents of the district for which the appointment is to be made. In contrast, the Senate bill provides for the selection of magistrates pursuant to standards and procedures promulgated by the Judicial Conference. It also calls for the establishment of merit selection panels, composed of residents of the individual judicial district. These panels would be used, however, only in the case of appointments to full-time magistrate positions.

We believe that either of these bills would make a marked improvement in the quality of magistrates; they both move in the right direction toward assuring a higher level of nationwide competence in magistrates and uniformity in the standards and procedures for their selection. The House version provides the sense of Congress on such important issues as the method by which the merit selection panel is appointed and the extent to which the district court is bound by the recommendations of the panel, and there is much to say for that approach. On the other hand, the Senate version would provide a framework within which similar standards and procedures could be established. Placing this authority in the Judicial Conference has the advantage of allowing a flexibility in reshaping standards and procedures as experience is gained. In the last Congress, I testified in support of provisions like those in the Senate bill. The Department of Justice continues to believe that this is the sounder approach. The use of selection panels for federal judges is still in the experimental stage, and much yet remains to be learned about them. Rather than freezing into statute one specific plan, it seems preferable to leave this matter in a more flexible posture.

Although it is important that magistrates have adequate support services, the Department is opposed to the mandatory language in H.R. 1046 specifically providing court reporters for magistrates. We prefer the Senate bill, which relies on existing law. There is adequate statutory authorization under 28 U.S.C.

§ 753(g) to allow the supplementation of existing court reporter services if it is necessary on a case-by-case basis.

Consensual civil jurisdiction

Another key feature of the proposed Act is that it authorizes magistrates to make dispositive judgments in civil cases, but only if the parties have knowingly and voluntarily consented to have the action referred to a magistrate. The bill permits parties to direct to magistrates those cases which do not require the special attributes of Article III judges, but which do require an impartial generalist to resolve issues of importance to the parties. Thus, it allows parties to utilize magistrates and judges in a way that takes maximum advantage of the particular attributes of each position.

We anticipate that if the magistrate system in the United States is modified along the lines provided in H.R. 1046, it would operate in a way that is similar to the English masters system. During hearings in the last Congress, Professor Linda Silberman, one of the leading scholars on magistrate jurisdiction, pointed out that "[e]xperience in England shows that litigants often consent to trial before [the English counterpart of the federal magistrate] because they are likely to get an earlier, surer and less formal trial with a significant saving of expense." Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary 181, 95th Cong., 1st Sess. (1977). The proposed Magistrate Act of 1979 would provide a similarly efficient and effective alternative to a full trial before a district court judge.

Thus, the expanded use of well-qualified magistrates will provide the district courts with a useful device to alleviate overcrowded dockets. Some people have expressed the concern, however, that this proposal would permit busy district court judges to shunt powerless litigants to magistrates. H.R. 1046 is carefully designed to insure that this will not occur. The bill makes clear that no coercion will be tolerated. Indeed, H.R. 1046 explicitly precludes the district court from making any "attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate." We view this language as a crucial safeguard against what has been characterized as the possible "velvet blackjack" problem. This is the apprehension that district judges might attempt to force some parties into magistrate court by intimations of lengthy delays manufactured in district court if they persist in requesting an Article III judge.

Thus, H.R. 1046 is carefully crafted to mandate full, uncoerced consent by the parties to magistrate jurisdiction. The use of magistrates will allow district judges to make more efficient use of their time and to devote themselves more fully to the more important and complex judicial business. As a result, it is the opinion of the Department of Justice that provision of upgraded magistrate services for civil cases involving small claims and no major constitutional or statutory issues will make it easier for those cases that do involve statutory and constitutional problems to gain access to Article III judges.

Procedures for appeal in civil cases

Another key feature of the bill concerns procedures for appeal in civil cases. As the Department testified in the last Congress, we support an approach in which the magistrate's final judgment would be appealable on the record initially to the district court. Thereafter, an appeal from the district court decision would be to the court of appeals on a petition for leave to appeal which the court of appeals would pass upon discretionarily. This petition could argue any prejudicial errors below. Once the court of appeals had decided the case, its decision could be reviewed on certiorari by the Supreme Court, as can other courts of appeals' decisions. If the court of appeals did not grant leave to appeal, there would be no further review.

We base our preference for this appellate structure on two premises: (1) litigants in the federal system should be entitled only to one appeal by right; and (2) parties who desire expedited magistrate trials would likely prefer rapid, less expensive, initial appeals to the district court. As Attorney General Bell pointed out during hearings before the Senate last Congress:

[T]here is considerable merit in structuring the appellate procedure in this way. Some would prefer to have the initial appeal be by right to the court of appeals. This, I believe, would substantially lessen the effectiveness of the legislation. * * * [The] cases [that go before magistrates] may involve larger fact-predominate questions with no difficult issues of law or involve small amounts in controversy.

To require litigants to embark on an extensive journey to a circuit forum for an initial appeal and to wait for a three-judge sitting is not consistent with the bill's design.

Once again, the small case is made a big, drawn-out case, requiring three judges and a wait of up to 2 years or more depending on the circuit. Flexibility would be lost because the courts of appeals are * * * more centralized and less in touch with local conditions. Magistrate Act of 1977, *supra*, at 152.

Almost all modern thinking about judicial structures holds that one appeal of right is all that should be provided. Moreover, most modern thinking holds that we should not have two trials *de novo*. An initial appeal to the district courts is consistent with this philosophy. Furthermore, initial appeal to the district courts is in line with the general spirit which pervades the move to enlarge magistrate jurisdiction; that is to say, to accord an appellate procedure for cases that have gone to a magistrate which is somewhat simpler, somewhat more expeditious, somewhat less expensive than existing procedures.

Leo Levin, former Executive Director of the Commission on Revision of the Federal Court Appellate System and now Director of the Federal Judicial Center, supported the Department's position in testimony before the Senate. He noted that the realities of circuit appeals today are inconsistent with these goals of simpler, quicker, and less expensive adjudications. In circuits not practicing much screening of their cases, he pointed out, there can be delays of years—not a very “marvelous” prospect, as he put it, for those consigned to appeal magistrate decisions directly to the circuits. Furthermore, because of summary procedures, in some circuits there are hundreds of cases where “there is no oral argument, no eyeball-to-eyeball conference” and where the courts issue no “written opinions * * * of consequence.” Magistrate Act of 1977, *supra*, at 104.

Here again consent is a key feature of the program. No party is required to go to the magistrate in a civil case. When he does go, he would, under these provisions, know what the appellate avenue would be thereafter, and he could take into account initially in consenting to magistrate jurisdiction.

Both H.R. 1046 and S. 237 allow the parties to consent to an initial appeal by right to the court of appeals; failing such consent, review would be in the district court. Although the Department prefers all initial review of right in the district courts with review thereafter available in the courts of appeals, there are two points which can be made in favor of the approach taken in these two bills. First, it can be said that those who prefer the speedier, less expensive magistrate adjudication will also prefer the speedier, less expensive appellate review in the district court; therefore, the option of appealing directly to the court of appeals will not often be elected. Second, it can be said that the court of appeals is of such importance to our legal process that parties will not consent to magistrate adjudication if direct review to those courts were cut off. Thus, the argument is that there is value in providing alternative appellate routes, with the expectation that most appeals would go to the district courts.

There is one difference between the House and Senate bills on which I would like to comment. H.R. 1046 provides that, in the case where initial appeal has been taken to the district court, any subsequent appeal to the circuit court of appeals is by “certiorari.” The writ can be sought before or after entry of a district court judgment. S. 237 provides that such review in the courts of appeals is by a petition for leave to appeal. The Department favors the Senate language. Under it, the court of appeals would examine the merits of any fact or law question presented as part of its discretionary review. The availability of this kind of discretionary review, unlike the Supreme Court's certiorari jurisdiction, would not require a showing of the importance of the questions presented. The petition for leave to appeal is not a new concept in our law. Under 11 U.S.C. § 47, some bankruptcy litigants must petition the circuit to hear their appeal.

Constitutionality of the bill

The Department of Justice believes that there are no constitutional infirmities in H.R. 1046 or S. 237. The Subcommittee has been provided with an analysis of the constitutionality of the bill. Moreover, testimony in the last Congress and the Report of the House Judiciary Committee provide ample support for the constitutionality of these proposals. The constitutional issue may be stated thus: may a binding civil judgment be entered in an Article III controversy by a U.S. magistrate, subject to appeal to Article III judges, where Congress has authorized the exercise of such jurisdiction and where all parties to the controversy have agreed to the exercise of such jurisdiction? We believe that the answer is clearly affirmative.

On both history and authority it is inaccurate to say that every Article III controversy must be decided at every stage only by an Article III judge. There are numerous instances, in the past and the present, where non-Article III forums enter binding judgments in Article III cases. These include the territorial courts, the U.S. Court of Military Appeal, the Tax Court of the United States, and the State Courts. The question here is not whether Congress can exclude an Article III case altogether from an Article III judge at any stage. The bill clearly preserves the right to appeal to an Article III forum.

Some persons who have questioned the constitutionality of this bill have relied upon some judicial decisions holding that jurisdiction cannot be conferred upon a tribunal by consent of the parties where Congress and the Constitution have not authorized jurisdiction. But those decisions are not in point here. Under this bill, Congress would expressly authorize magistrates' jurisdiction, if designated by the district court. Thus, the parties would be consenting to a jurisdiction specifically conferred by law.

In testifying on the magistrates bill in the Senate Subcommittee during the last Congress, Professor Silberman concluded on the basis of her extensive research that the is "clearly constitutional." She went on to say, "[I]ndeed . . . Congress could make broader delegation under less retractive procedures without incurring constitutional difficulties." Magistrate Act of 1977, *supra*, at 185. Close attention was given to this issue during the last Congress, and the House Judiciary Committee reported that it was "confident that the proposed legislation pass[ed] constitutional muster." H. Rep. No. 95-1364, 95th Cong., 2d Sess. 10-11 (1978).

CONCLUSION

Enactment of these bills eliminating the general diversity of citizenship jurisdiction in the federal courts and expanding the jurisdiction of federal magistrates will be a significant step toward equipping the federal courts to deal more effectively with their caseloads. Enactment of the bills will also improve access to an appropriate judicial forum for civil litigants, both state and federal. Moreover, enactment of these measures now will go far toward obviating the need to create additional judgeships in the next few years. Accordingly, the Department of Justice urges prompt action by the Congress on these two subjects.

APPENDIX—PROPOSED MAGISTRATE ACT OF 1979

Set out below is a description of the points of difference between H.R. 1046 and S. 237. This description supplements the testimony of Assistant Attorney General Meador.

I. MAGISTRATE CASE-DISPOSITIVE CIVIL JURISDICTION

A. *House § 636(c) (1) ; Senate § 636(c) (1)*

Unlike the Senate bill, the House bill would allow exercise of case-dispositive magistrate jurisdiction only by full-time magistrates.

The House bill specifies that the magistrate designation can only be made by a majority of all the judges of the district court. Where there is no majority concurrence, the reference can be made by the chief judge. There is no parallel Senate language describing the reference procedure.

Section 636(c) (1) in both the Senate and House bills has the magistrate entering a "judgment," which is appealable to the district court. In House § 636(c) (5), which is pertinent to initial appeal by right to the court of appeals, the judgment entered is that of the district court. In S. 237 this judgment is that of the magistrate.

B. *House § 636(c) (2) ; Senate § 636(c) (5)*

The House bill contains provisions requiring blind consent to magistrate case-dispositive jurisdiction. It also contains a prohibition against any inducement by a district judge to coerce parties to agree to reference. The Senate bill does not have the blind consent language, only language forbidding inducement.

We might also note in passing that the House and Senate bills are ambiguous as to whether the parties are to be informed as to the particular magistrate they will receive.

C. *House § 636(c) (5) ; Senate § 636(c) (4)*

These provisions are relevant to the taking of an initial appeal to the circuit court, as opposed to the district court. Both bills allow the parties to agree at the

time of magistrate reference to take the initial appeal to the appropriate court of appeals. Where this appeal is taken to the district court, the subsequent appeal to the circuit court in the House bill is by writ of certiorari. In the Senate bill such appeal can be taken if the court of appeals accepts a petition for leave to appeal which specifies possible errors of law or fact. Unlike the House certiorari approach, this formulation does not give the circuit court the discretion to refuse to review an action because it does not present "important" questions.

D. House § 636(c) (6) ; no Senate language

The House bill contains language to the effect that court reporters must take down the proceedings in magistrate case-dispositive adjudications "if a district judge in such proceeding would have provided a court reporter under section 753, unless the parties with the approval of the judge or magistrate agree specifically to the contrary. Reporters referred to in the preceding sentence may be transferred for temporary service in any district court of the judicial circuits for reporting proceedings under this subsection, or for other reporting duties in such district court." The Senate bill contains no language pertinent to court reporters.

E. House § 631(b) (2) ; Senate § 631(b) (5)

The House merit selection language is more detailed than the Senate language. The House bill requires that a majority of the panel members must be members of the bar. It does not specify which bar. The panel members must be "residents" of the district in S. 237.

In the following areas, the House bill mandates particular procedural requirements that are not mirrored in the Senate bill :

(1) The House bill requires that a cross-section of the "legal profession and the community" be represented on the panel.

(2) House language permits the district court to choose a magistrate from the list provided by the selection panel. The language does not specify the procedure the district court is to use, *e.g.*, majority vote.

(3) H.R. 1046 allows rejection of the first list provided. This language requires a majority vote by the district judges to reject. No provision is made for rejection by the chief judge if there is a deadlock on this issue. So, where a majority cannot agree to reject the first list, that list must be used for the selection.

The House bill provides that "Congress (i) takes notice of the fact that women and minorities are under-represented in the federal judiciary relative to the population at large; and (ii) recommends that the Panel, in recommending persons to the district court, shall give due consideration to qualified women, blacks, Hispanics, and other minority individuals." The term "minorities" is not defined.

The Senate approach would not insert any language into title 28, and provides only the sense of Congress. It would not affirmatively encourage selection of minorities or women, providing that only the "best" qualified are to be selected regardless of "race, color, sex, religion, or national origin."

With regard to the means by which a district court may indicate to the Judicial Conference that the merit selection procedure is too onerous in its application to appointment of part-time magistrates, the House bill provides that "[a] district court which cannot meet the procedural requirements of this paragraph, for good cause shown, may appoint a part-time magistrate pursuant to its own publicized procedure, after having filed with the conference the reasons for not being able to comply with the requirements of this paragraph."

The Senate language makes its general language on selection panels applicable only to the appointment of full-time magistrates.

F. House § 633(d) ; Senate § 604(d) (3)

The House bill has a provision requiring reports by the director of the Administrative Office of each Congress on the professional qualifications of persons appointed under the merit selection procedures: the types of matters adjudicated under § 636(c) (civil jurisdiction); and the number and type of appeals taken.

The Senate bill has a more limited less-specific provision which would amend another section of the title relevant to existing Administrative Office reporting duties and require reports annually. The Senate would require reporting as to the magistrates' "professional backgrounds and qualifications, and any appeals that may be taken from the decisions of magistrates."

The Administrative Office may be able to advise the Subcommittee whether any of the House language, in light of present reporting requirements, is redundant.

II. MAGISTRATE CASE-DISPOSITIVE CRIMINAL JURISDICTION

A. House § 3401(a) ; Senate § 3401(a)

Unlike H.R. 1046, S. 237 creates a presumption against petty offense jury trials before a magistrate or a judge. Such trials shall occur only if required by the Constitution.

H.R. 1046 also requires written waiver of the right to district court adjudication for both petty offenses and other misdemeanors, even though the petty offender's right to adjudication by a district judge may not be Constitutionally mandated, see H. Rep. No. 95-1364, 95th Cong., 2d Sess. 20 n. 36 (1978). S. 237 does not require such written waiver. It only directs the district court to inform the defendant of his right. Both bills do not require written waiver of any jury trial right the defendant may have.

B. House § 3401(f) ; Senate § 3401(f)

In its subsection pertinent to the Government's ability to petition for the removal of any misdemeanor adjudication to the district court, the House bill has language specifying that "nothing in this subsection shall be deemed to limit the discretion of the court to have any misdemeanor case tried by a district judge rather than a magistrate." Apparently this language was intended to preserve the court's right to bring a case to the district court on that court's own motion. The Senate language more specifically accords the district court this *sua sponte* privilege.

C. Senate § 3401(g) ; No House language

The House bill does not permit magistrate adjudications under the Juvenile Delinquency Act. The Senate bill would allow a magistrate to adjudicate any juvenile conduct if it would give rise to a misdemeanor violation if committed by an adult. "Petty offense" juvenile proceedings before a magistrate could be initiated without 28 U.S.C. § 5032 certification by the Attorney General. No term or commitment imposed by a magistrate on a juvenile could exceed six months.

Mr. MEADOR. Thank you.

As this subcommittee well knows, these two subjects have been extensively explored and debated. In view of all of that, rather than go through the two bills in detail, initially I would prefer to make some more general observations about the setting and the nature of the problems to which these bills are addressed. There are a number of brief comments to be made about them, and then I will attempt to answer any questions the subcommittee may have.

These two bills are part of a larger constellation of proposals that are before the 96th Congress, addressed to problems of the Federal judiciary, and indeed, more broadly, to the problems of the justice system. The problems we have today are legion, and I think it's important to look broadly at where we are, where we have been, and what lies ahead, in order to understand the importance of these two bills.

Without getting overly tedious on history, I'd like to look back just a moment to bring us up to date. The history of the modern judiciary, I think, begins with the passage of the Federal Judiciary Act of 1789, which created the current courts of appeals. We had through that act an intermediate tier of courts whose primary function was to provide a review of right for all Federal trial court judgments. That proposal has worked very well until modern times. It has provided an effective means for dealing with the rising flow of cases over the decades. The courts are in some difficulty now, and are part of the current set of proposals pending before this Congress, that is addressed in some respects to structural difficulties in that intermediate appellate level.

The next major development was in 1925, with the passage of the so-called judges' bill. The significance of that bill lies in its furthering the efficiency of the Supreme Court by converting the Court's jurisdiction to a large extent, to a discretionary basis, leaving the Court free, to

a far higher degree than ever before, to fix its own docket and control what cases it would hear. This system has been very successful through the decades, but it likewise is now encountering new circumstances and difficulties. One of the proposals before this Congress is addressed to those problems.

Then, next, we come into the 1930's. There were two significant developments. One was the passage by the Congress of the Enabling Act. That act gave the Supreme Court broad rulemaking authority, under which it has established the Federal Rules of Civil Procedure, the Rules of Criminal Procedures, and so forth. This rulemaking authority has served us basically well. But it likewise now encounters some difficulties, and there are studies and considerations underway to meet some of those problems.

The other development in the 1930's was the Supreme Court decision of *Erie Railroad against Tompkins*. As Judge Jerome Frank said, that decision, in effect, made "ventriloquist dummies" out of Federal judges insofar as State law is concerned. That case is a major one in the history of diversity jurisdiction.

After that, in the years following the Second World War, the Federal judicial system functioned fairly well. There were no serious difficulties until the 1960's. Then our current set of problems commenced. And they've grown as the years have passed.

What began in the middle 1960's was what had been called the litigation explosion—a rapid, almost unprecedented rise in the volume of cases flowing into the courts, States as well as Federal.

Not only has the volume swollen each year, but also, the complexity of cases has increased. More cases today are multiparty, more involve two or more claims. The issues they present are more difficult. Technology is on the scene. Social conditions have grown more complicated.

In the late 1960's, there were two developments of significance in the movement to solve the problems of the judicial system. One was the creation by Congress of the Federal Judicial Center. This has proven to be an extremely valuable arm of the Federal judiciary for purposes of educating its personnel and for conducting research into its problems.

The other development during that period was the enactment of the Federal Magistrates Act. That act made available to the Federal courts a system of magistrates, people who could act as subordinate judicial officers. It is on that bill that we seek to build today with the bill that is before the committee now.

We come into the 1970's. The problems continued. Some additional judges were added in 1970. That increase in judges was hardly felt, though, the volume of cases was swelling so rapidly.

Throughout this decade there have been discussions, debates, conferences, speeches, writings, all addressed to the problems of the Federal courts. We had the Freund Study Group which addressed the problems at the Supreme Court level. Then came the Hruska Commission, authorized by the Congress to examine the whole appellate structure of the Federal courts. It held extensive hearings and submitted recommendations. There have been such things as the Pound Conference and miscellaneous other meetings. Thus, there has been a great deal of discussion and concern and debate. But I think it's fair to say that through the 1970's, there has been relatively little action.

The only significant step, and it was indeed significant, was the passage last year of the Omnibus Judgeship Act which provided badly needed additional judgeships for the Federal system. There has been growing recognition of the problems, though. The feeling that something needs to be done beyond adding judges has been reflected, I think, throughout the 95th Congress and on down to date.

Two things in the first session of the 95th Congress I think were significant. One was the set of hearings held by this subcommittee in 1977, oversight hearings concerning the entire justice system. I think that was an extremely useful stocktaking of the perceived problems and the range of suggested solutions. It shows that this subcommittee is alert to the fact that there are systemwide problems needing attention.

Also in that year there was the creation by the then new Attorney General of the Office for Improvements in the Administration of Justice. That was significant because the creation of the Office brought the executive branch of the Government, through the Justice Department, for the first time into the business of looking broadly at the problems of the federal court system, identifying what the problems are, and attempting to develop solutions or at least proposals to ameliorate those difficulties. I believe that the Office is likely to be a permanent part of the Department, and it will continue to work effectively. I believe, with the Congress, with the courts, with other Government agencies and private groups to develop acceptable solutions to the problems of the system. That's the spirit in which we attempt to carry out the Office today.

This brings us down to present time, with this constellation of proposals that have already been introduced in the 96th Congress. My further preliminary observation concerning our present posture is that the passage of the Omnibus Judgeship Act last year, while a very important and necessary step, cannot be viewed as a solution which allows us to rest our oars and wait to see what will happen next. Every indication is that the business of the Federal courts will continue to increase. I know of no individual who has looked seriously at these problems and has made a prediction that it will either level off or decrease. All the indications are toward an increase. Congress passes new legislation. Agencies issue new regulations. All of these breed new litigation. The country is growing in population. The social conditions that tend to foster litigiousness are not likely to diminish.

So, collectively, I think it's safe to predict the continued rise in litigation. We would not be advised, in my judgment, to rely upon the judgeship bill to ameliorate our problems. Indeed, I believe it would be very unwise and shortsighted to take a wait-and-see attitude. If we wait and see for 3, 4, or 5 years, the likelihood is that the pressures for new judgeships will again be back on Congress. Then, it could be too late to adopt preventative or corrective measures. Congress may again find itself with no alternative but to add new judges. I believe there's a limit to increasing the number of Federal judges as a solution, both in cost terms, as well as in the ultimate status of the Federal judiciary itself.

So, we begin from the premise that we must seek means to adjust procedures, jurisdiction, and structures within the justice systems, both State and Federal, in order better to handle the legal business of

the American people. These two proposals here today are important parts of that picture. They're aimed at two objectives. One, the diversity bill is aimed at a more rational and sound realignment of business between the State and Federal courts. The other, the magistrates bill, is aimed at equipping the Federal judiciary better to handle the business which properly comes to the Federal judiciary. Let me comment briefly on the two bills and then I would welcome questions.

Taking the magistrate bill first, it is designed, as I have just said, to increase a useful resource which the judiciary already has. The magistrate system stems from the act of 1968, and experience has demonstrated the utility of these judicial officials. Indeed, experience has brought a great many lawyers and judges to perceive that magistrates can be put to even greater use. These types of subordinate judicial officials are not novelties. Virtually every judicial system in the English-speaking world has some type of subordinate judicial official. They go under various titles. Some are called masters, some commissioners, some various kinds of inferior judges, and some magistrates. They are an auxiliary to the basic level of general trial judges. They're used for pretrial matters, posttrial matters, and for hearing and deciding miscellaneous kinds of cases.

The beauty of the magistrates bill is its flexibility. This bill does not mandate any court to adopt any number of magistrates. It empowers the Judicial Conference of the United States to determine how many Federal magistrates, part time or full time, would be useful in any particular judicial district. The bill doesn't leave the entire matter in the hands of the Judicial Conference, either, because Congress does retain the power, of course, of appropriations. It has that check.

We have 95 judicial districts in this country and they range from Maine to Hawaii, from Puerto Rico to Alaska. Conditions vary economically, socially, and geographically. The nature, types, and volumes of cases vary considerably. This bill would enable the Judicial Conference to supply magistrates on a basis of need from time to time and year to year, district by district. Business ebbs and flows, comes and goes. What is heavy on the docket today in one district may be gone tomorrow. With an 8-year term, magistrates positions can be readily terminated. They can even be terminated short of that, if the Conference finds the need is great.

This bill does two essential things in the magistrate system. First, it somewhat enlarges the authority of magistrates to enable greater use to be made of them in handling judicial business. And second, it provides a means for upgrading the selection process, and hence for improving the quality of magistrates in a nationwide, uniform way.

The jurisdictional authority of magistrates is increased in both criminal and civil cases. On the criminal side, magistrates would be authorized to try any misdemeanor case, that is to say, any Federal criminal offense in which a 1-year term of imprisonment may be imposed. However, magistrates would exercise this jurisdiction, only with the consent of the defendant. The defendant would have the option of a trial before a district judge.

On the civil side, the case jurisdiction which is authorized here is strictly consensual. Both parties must agree to a trial and judgment by the magistrate before any jurisdiction can be exercised. Moreover, the magistrate cannot exercise that jurisdiction unless the district court so designates. It's a double layer of protections.

The selection procedures look toward a system of nationwide uniformity involving recommendations by screening panels with procedures set forth for appointment by the district court, by the majority of the district judges.

Now, I'd like to make a few comments about the diversity bill. This bill, as I've said, seeks to achieve a more rational realignment of business between Federal and State courts. Congress, of course, is the gatekeeper for the Federal courts. Under the constitutional plan, it is for Congress to say what business may flow into those courts. So, it is in your power to draw the line and allocate. You must remember, too, if you're talking about purely State law cases, it is somewhat of an anomaly to have these cases in the Federal court to begin with.

We know the provision in article 3 authorized Congress to grant jurisdiction to the district courts in cases between citizens. However, I think it's very important to note the fact, which is little noted, that in the Judiciary Act of 1789, in that original grant of diversity jurisdiction, the jurisdiction was extremely limited—much more so than today.

The original diversity jurisdiction applied only where the suit was brought in the State of which one party was a citizen. When you add that to the realization of the limited scope of in personam jurisdiction which obtained at that time, you can see the net effect was that the jurisdiction was designed to take care of the out-of-stater who had to travel to the home State of his defendant-opponent and file suit. Without the diversity jurisdiction, the out-of-stater would have been compelled to sue in the State courts of his opponent, the defendant.

It was not until 1875 that the diversity jurisdiction was expanded to its present scope. The reasons for that expansion have never been clear. It can be noted, though, that at that time there was considerable enlargement of Federal jurisdiction on an almost unthinking basis. That was a great era of Federal expansionism, a kind of heady, nationalistic era. Much of that expansion was later corrected either by statutory amendments or by narrowing judicial constructions.

As a result, the statute evolved that authorizes suits today between citizens of different States, no longer tied to the original theory of prejudice against the out-of-stater. For example, a citizen of State A suing a citizen of State B can file that suit in the Federal court in State C, where there's no reason to think that the courts of State C are going to be any more prejudiced against B and A. Moreover, a complainant can file suit in his own State. So, the original diversity rationale does not fit the present contours of the jurisdiction.

The question, of course, is the present utility of the jurisdiction. The debate has heightened since the Second World War. The decision of *Erie Railroad against Tompkins* set the stage for it because it compelled Federal judges to follow State law, thereby stripping them of the kind of creative role they had prior to that time.

During the hearings last week, one of the witnesses quoted Justice Frankfurter and Justice Jackson from the 1940's and 1950's recommending abolition of diversity jurisdiction. Other influential judges and lawyers since that time have strongly urged that this step be taken. The debate has heightened in recent years, and of course, as you know, this House passed a bill abolishing the general diversity jurisdiction last year.

The question before us now is the contemporary utility of that jurisdiction. And I submit the jurisdiction does have some contemporary utility in special situations. I think it's fortunate that we have the diversity clause in article 3 of the Constitution so that Congress has an option from era to era to fit that jurisdiction to the needs of the times. An excellent illustration of the contemporary utility of diversity jurisdiction is in the interpleader statute, 28 U.S.C. 1335. There, you have a situation where there are widely scattered multiple complainants, so that no single State court can gather them all in. Under the Federal statute, a forum is made available through the diversity jurisdiction to allow the stakeholder, the would-be defendant, to gather in all of the complainants and have the single liability adjudicated in one proceeding, thereby avoiding multiplicitous lawsuits and possibly conflicting outcomes. We heartily endorse the retention of that provision as a good contemporary use of the diversity jurisdiction.

Another possible situation in which the diversity jurisdiction could serve some genuinely useful purpose today is in so-called "mass tort" situations. A typical example is an airline crash where dozens or even 200 or 300 persons are injured or killed; there will be many suits for personal injury or wrongful death. There is considerable interest in devising a bill to take care of that situation, assuming the general diversity jurisdiction is eliminated. The Department has given some thought to that statute, and we will be happy to continue working with this subcommittee in developing a bill along that line if there is any interest in that direction.

Another way of approaching that problem would be through the enactment of Federal substantive legislation. There is a bill currently pending, introduced by Mr. Danielson, that would do that in the airline crash situation. That's an alternative approach. Indeed, a number of the interests which people are concerned about under the general diversity jurisdiction might better be accommodated through carefully drafted Federal substantive legislation, which would give us a genuine Federal case that could come into Federal court under the Federal question jurisdiction.

Now, aside from special situations of that sort—the interpleader situation, and possibly the mass tort case—our submission is that the general diversity jurisdiction, as it presently exists, does not serve a substantially useful contemporary function. Indeed, we would submit that, in many respects, the present diversity jurisdiction is dysfunctional, arbitrary, whimsical, and works a denial of the equal protection of the law in some situations.

There are no doubt a great many prejudices abroad in the land which unfortunately infect the administration of justice. We are all aware of these biases, based on such things as race, ethnic origin, religion, economic status, occupation, and many other things. It seems to me, though, the modern consensus is that bias against a person because of the State from which that person comes ranks relatively low on the scale of prejudices; certainly, it is not high enough to justify a special category of jurisdiction amounting to over 30,000 cases a year in the Federal district courts. Moreover, the jurisdiction is simply not tailored carefully to obviate that kind of prejudice. It lets in cases where the prejudice is not likely to be present, and it keeps out a great many others where prejudice is present.

Last week in the hearings here, two situations were mentioned which I would like to comment on just a moment, because I think they illustrate the whimsical, arbitrary character of the present jurisdiction. One was the example of an Indian in Arizona suing a large trucking company for personal injuries. The suggestion was that in the county where the injury occurred or where the Indian lived he might not be able to secure a fair trial, but he could do so by filing a suit in the Federal district court. Well, in this situation, as I understand it, the problem has nothing to do with diversity of citizenship. The problem is one of prejudice against Indians, which undoubtedly may be serious.

But the fact that the trucking company holds an out-of-State piece of paper as a source of its incorporation has nothing to do with it. The case would be identical if the Indian were run over by a truck of the same model owned by a corporation with Arizona incorporation papers. But in that event, the Indian would not have the option of suing in the Federal district court. He would have no choice of forum, whereas if the Indian happened to be run over by the truck with the out-of-State papers, he would have the option of forums.

Thus, if two Indians in the same locality were run over on the same day by two identical trucks, one owned by an out-of-State corporation and the other owned by an in-State corporation, one injured person would have a choice between a State and Federal forum, while the other person would have no such choice of forum. That is what I mean by a denial of the equal protection of the laws. At the least, it seems to me, this is a jurisdictional structure along more or less arbitrary, whimsical lines. That is to say, the fact of the out-of-State incorporation, out-of-State citizenship, is of little consequence in that situation.

Another hypothetical case was that of a large corporation located in a small community, a community in which that corporation was a dominant element. I gather the suggestion was that in litigation between local citizens and that corporation, it was doubtful whether a fair hearing could be obtained. I wasn't sure whether the fairness or unfairness ran to the plaintiff or the defendant in that situation. But the thought was that the company, the opponent of the corporation, or either one of them, should have access to a Federal district court. That, of course, is true under present law, assuming that the large corporation was incorporated out-of-State and did not have its principal place of business in the State.

Again, we have a problem about the fairness of the administration of justice. But it has nothing to do with the out-of-State character of the corporate party. It stems from other biases. The factors would have been exactly the same if the corporation initially had been charged in State court. Again, whimsical and almost arbitrary access to two forums instead of one is provided for some litigants and not for others.

We have to remember that annually there are between 6 million and 7 million cases litigated in the courts of the States, that is, the 50 State systems plus the District of Columbia; however, there are only about 30,000 diversity of citizenship cases in Federal court. So, a handful of litigants are getting a choice of forum on what is increasingly a whimsical and arbitrary basis, whereas a large number of equally deserving litigants are not.

Some statistics were put in the record in the hearings last week on which I would like to make a brief comment, because I fear if they are left without comment they could create a misleading impression. The

statistics I refer to are some comparative figures showing delay in the Federal district courts and in the State trial courts in a half dozen metropolitan areas. The figures that were offered showed substantially longer delays in the State courts than the Federal courts. Similar figures were put in the record last Congress in the hearings before this subcommittee.

We have looked into the situation, and while the sources are not cited, it is our best finding that the figures come from a report done by the Institute of Judicial Administration in 1974. It appears that the figures are highly misleading. Indeed, my Office has been informed by a former Director of the Institute that the statistics were viewed as being so unreliable that the Institute ceased distributing them or relying on them in any way.

What we have is a situation of comparing apples and oranges. Even more than that, the statistical apples and oranges here often are very squishy and dubious. The State data in those figures are based only on personal injury cases; the Federal figures are based on all jury trial cases which include a great deal more than just personal injury cases.

Moreover, the Federal figures were based on a period of time from the joining of issue to final disposition. Although the basis of the State figures is not entirely clear, it appears that they were based on time from filing to disposition, which would naturally give you a somewhat longer period of time than the time from joinder of issue to disposition, which was the basis for the Federal figures.

All in all, I simply want to submit to the committee that no reliance whatsoever should be put on those data. Moreover, I would deem those sorts of figures for a few isolated places to be immaterial. Our review of the nationwide scene suggests that the situation varies from one place to another. There is simply no national pattern. In some places, Federal district court civil cases take longer; in other places, State courts civil cases take longer. You can find samples of both around the country, although there are no complete and authoritative data.

In any event, I do not think that kind of exploration is rewarding. The facts are that the 30,000 diversity cases, if transferred to the State courts, would not make a great deal of difference, speaking generally, to the State court systems. The added increment to the State caseloads would range from a low of less than 1 percent in some States to a high of slightly over 3 percent in other States. Nationally, the average increase in State caseloads would be 1.03 percent. That is hardly a noticeable increment, speaking generally. In other words, this should not be a consequential factor in your determination of the merits of the legislation. Moreover, for the last 2 years, the chief justices of the 50 States have said consistently that the State court systems are ready, willing, and able to take these cases.

So, all in all, we come down to a proposal whose time, I think, has come. It has been debated for 20 or 30 years. There is wide support for it. And I invite the Congress again to act expeditiously on this proposal.

I have lived closely with this idea now for 2 years. I have talked with a great many people in various segments of the bar and the public. The significant opposition to the proposal comes from some segments of the litigating lawyers. I have listened closely and considered their arguments. It is my judgment that a major consideration behind their arguments is the natural and understandable desire of a

litigating lawyer to have as wide a choice of forum as he can. I understand that clearly. I was once in the practice of law with a busy litigating firm, and I realize that if there's any choice at all, you'd like to have it. There's nothing improper about that. It's an advocate's job to pick the forum that will likely produce the most favorable result for his client, if he has a choice. But it doesn't follow from that that Congress must allow that choice. I think it is a luxury that the system as a whole, nationwide, in the interest of all American citizens, can no longer afford.

So, Mr. Chairman, I would urge the committee to proceed, as it did last year, to recommend passage of both these bills. And I hope the House will again act and vote as it did last year.

Mr. KASTENMEIER. Thank you very much, Mr. Meador, for a very fine statement on both the history of the Federal judicial system, and a brief summary of your position on magistrates and on diversity.

I have a number of questions, but first I would like to yield to my colleagues so that they may have an opportunity to ask questions.

I will yield first to the gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman.

I have enjoyed your presentation, and I am very interested in this subject, as I am sure you appreciate from having been here before. I can't honestly disagree with any of the observations you made. I have some disagreement with one or two of the conclusions, such as the fact that it operates inequitably in the sense that many people who have the same problems to which we find some alleviation in some cases by resort to Federal jurisdiction—I am not sure that the answer is to take the alleviation away from everyone, because it isn't applied to everybody. That reasoning doesn't really satisfy me.

You've said that there has been some effort devoted to exploring the possibilities of these multiple cases such as airline crashes and perhaps interpleader situations. I have been kind of looking around, myself, to the point I have even asked the assistance of some of the bar groups, in which I used to be an active member.

I wonder if there is some way that is more intellectually honest, let's say, in that it doesn't hang on a basic reason that perhaps no longer exists; namely, in most cases, the prejudice is because of out-of-State residence, and still preserve some protection in those situations where Federal jurisdiction, when it is fortuitously available, serves a very useful and legitimate purpose.

I have spent a little time thinking about it, and I am somewhat at a loss. But I address the situation which you alluded to, although I don't think you stated it as I had intended to state it. Take a small rural community with a very dominant corporation in it, perhaps the world headquarters of a big company that is the economic mainstay of almost the entire rural county directly or indirectly, and bring in a plaintiff, where there is a really devastating or life-threatening type claim. They would obviously have problems with a jury selected from that county and perhaps even from a State judge who would, in almost all cases, be a close personal acquaintance of most of the executives of the company.

I recognize intellectually, in the case I was referring to, a company from Detroit would be in as bad a position as a company from Toledo, Ohio. And, therefore, the reason isn't sound, but the problem is a sound one. A great advantage would accrue to being able to get into

a Federal court with a broader jury selection that far transcended that of a typical State judicial circuit, and perhaps a judge far more removed from the case.

Also, from an access point of view, I come from a district which is probably the longest in the country, about 900 miles from the southern border to the northwestern border. A lot of it is highly rural and very difficult to get to except by automobile. In some of the counties it would be hard to find pleasant accommodations for any number of witnesses or all of the State counsel.

Has any thought been given to the possibility of pinpointing those kinds of areas where there may still be a legitimate reason to resort to Federal jurisdiction without keeping it hanging on this less-than-full thing of diversity of State citizenship?

Have you given any thought to that?

Mr. MEADOR. Some. I will try to answer you, but probably not wholly satisfactorily.

One suggestion that has been made off and on through the years is that we should abolish the general diversity jurisdiction but have a statute which would provide that if a party could make a satisfactory showing to a Federal district judge in a diversity situation—it would have to be limited to that, I think, for constitutional reasons—the district judge could authorize the removal of the case or the bringing of the case in the Federal district court. This would amount to a kind of case-by-case assessment of the likelihood of prejudice in a diversity situation.

Now, I have never been taken with that idea, myself, for a practical reason: It has seemed to me that this is the kind of thing that would be very difficult to show, even though it may exist. Moreover, this process is likely to be a litigation breeder. You set up a temptation to parties in all kinds of cases to try to make a showing, whether or not they really can. But that is one suggestion, and it may be that a statute could be drafted along those lines. It would meet some of those problems.

There is another suggestion that moves in the direction of what you say, which was set forth in an article in the Harvard Law Review recently by Prof. David Shapiro of the Harvard Law School. He suggested that diversity jurisdiction be based on district-by-district option. The suggestion was that Federal judges in each district determine whether the diversity jurisdiction was needed or useful in that district, in light of local conditions.

That's a novel suggestion, but novelty does not and should not condemn anything. It's novel because I don't believe we have any other situation in which Federal subject matter jurisdiction is left to the option of the court, even though it is based, of course, on an express act of Congress. It is a possibility. Something along that line might be feasible, but I have not thought the issue through seriously myself.

Mr. SAWYER. Do you think there would be any constitutional power or justification to a statute or rule that would permit on application to a Federal court and, some kind of a satisfactory showing, for a Federal court to remand a matter to a State court but with conditions such as convenience and scope of jury selection so that something similar to the problems that are acknowledged are being avoided by going into the Federal court, could be made available by direction to State courts?

Mr. KASTENMEIER. It's necessary for me to interrupt at this point,

since we have a vote on, to inquire of my colleagues who are here, Mr. Sawyer, Mr. Gudger, Mr. Matsui, if you desire to return, should we ask Mr. Meador if he'd be good enough to remain?

That is to say, if you have questions which justify retaining Mr. Meador until after the vote, we will do so.

Mr. MATSUI. Mr. Chairman, do you have questions that you would like to ask?

Mr. KASTENMEIER. Yes.

Mr. MATSUI. If you do, I would certainly like to hear the answers, and I would certainly come back to hear them.

Mr. KASTENMEIER. In that event, I think we will recess and return, since we have about perhaps 8 or 10 minutes to answer the vote. And it's an important vote.

We would ask Mr. Meador if he would again be patient, and we will return in about 10 minutes to resume.

Until that point, we stand in recess.

[Brief recess.]

Mr. KASTENMEIER. We will come to order.

When we recessed for this last vote, the gentleman from Michigan, Mr. Sawyer, was in the process of asking a question.

Perhaps if Mr. Meador recalls the question, he may answer.

If not, maybe Mr. Sawyer or the stenographer can restate it.

Mr. MEADOR. Thank you, sir. I'll undertake to answer the question, as I recall it. As I understand the question, it seems to me to focus on the extent to which there is Federal power to regulate State judicial procedure in civil cases. The same question, I suppose, could be asked about criminal cases. I use the words "Federal power," because it seems to me that is the question. Whether it has to be done, or to what extent it has to be done through congressional enactment, to what extent it could be left to a case-by-case determination by a Federal district court. The question is whether this Federal power at all regulates State procedure.

Mr. SAWYER. That's precisely the nub of the question.

Mr. MEADOR. I must confess that question activates all my residual juices as a law professor. It's a beautiful question to explore in the classroom. In my judgment, I have not seen a definitive answer to that question. Indeed, it has not been explored in depth, although it has been suggested, from time to time. Most of the suggestions I've run across have been in the criminal area, based on perceived deficiencies in State criminal procedures.

It has been suggested that the Congress should consider enacting a code of criminal procedure that would apply to criminal prosecutions in the State courts. The theory is that under the powers of Congress derived from the due process clause of the 14th amendment, the Congress could do that in the interest of preserving due process of law to defendants in the State courts. If there's power to do it in criminal cases, I would assume, given some satisfactory group of findings, Congress is empowered to do it in civil cases, also.

My short answer is this is an interesting and very difficult question and, I might say, I would be quite interested in responding some more. Indeed, if the committee is interested in pursuing it seriously, I'll be glad to say that my office will pursue it with you.

However, I don't believe the diversity bill should be help up pending the working out of this other matter. It is a very complicated ques-

tion. It would excite lots of political interest of all sorts. A lot of bases would have to be touched and discussions held, I'm sure. Moreover, we are not really confident, it seems to me, of exactly the dimensions of the problems or where they are located.

One of the positive virtues, by the way, of enacting H.R. 2202 and withdrawing the general diversity jurisdiction would be that it would, I believe, reveal in a clearer way than is now apparent where some of the worst deficiencies in the justice system are located. By removing the escape valve of the Federal district court, it would force litigants to concentrate more closely on the State court systems. I think this would bring to the surface, more clearly, the pockets of problems that no doubt exist. And I think that might accomplish two things. One, it would perhaps force the States themselves to take a closer look at the situation; it might place pressure on State legislatures and State courts to improve their system and develop their own means for overcoming these problems. Second, it may lay the basis factually so the Congress could give further consideration to such ideas as that which you're suggesting, and that which Professor Shapiro has suggested. Will surely know more about where the real problems are if we take away the diversity escape valve.

I don't know if this is a satisfactory answer to your question——

Mr. SAWYER. No; I appreciate your answer. That's precisely what I see as the advantages, and I think I know where the majority of the problems would lie.

I was trying to think of some way we could save the benefits of diversity jurisdiction that perhaps work beneficially for the wrong reason; if we have principled legislation, we may be able to correct some of the problems.

I thank you very much. You were very helpful.

And thank you, Mr. Chairman.

Mr. KASTENMEIER. I'd like to call on the gentleman from California, Mr. Matsui.

Mr. MATSUI. Thank you, Mr. Chairman.

Just a couple of brief questions.

Mr. Meador, I want to say that I thought your presentation was excellent, and I appreciate the fact that you've come here and testified before us today. I just have one area on the interpleader and the mass tort issue that you raised in your opening statement.

Would you suggest that we actually put those in this legislation now?

Mr. MEADOR. Well, of course, the interpleader statute is already there and the legislation doesn't change it. We endorse that position. That provision seems to be working well, and I perceive no revisions that need to be made on the interpleader situation at the moment.

As to a mass tort provision, I would say that this does seem to be a subject that is worthy of serious consideration. However, as I just said, I would not suggest that we delay the diversity bill here to work that out.

It seems to me the wiser course is to proceed and move the bill to abolish the general diversity jurisdiction. In the meantime, if the committee wishes to explore that other issue, I would certainly commit my Office to work closely with the committee and, as quickly as possible, to develop some proposal.

Mr. MATSUI. Thank you.

I have no further questions.

Mr. KASTENMEIER. I'd like to comment.

We, of course, look for opportunities to explore some direct and some tangential issues that are suggested by legislation such as that before us. Sometimes other forums, than our own hearings can be used.

This weekend, for example, I hope some members here will be at Williamsburg and will be able to talk to the members of judiciary, and members of the Justice Department about such matters. Many of us will be present, as well as our Senate colleagues.

I bring that up parenthetically. It has nothing directly to do with this matter, but it is true that these hearings tend to be somewhat limited in terms of focus, and some of the far-ranging questions which are suggested probably can be dealt with in other forums.

The gentleman from North Carolina, Mr. Gudger.

Mr. GUDGER. I want, Mr. Chairman, to thank Professor Meador for his very enlightening presentation and for clarifying, in so many instances, details of fact that I find very useful: The knowledge of the number of State trial judges, the fact that there will be only an approximate 1-percent increase in State caseloads, and the total burden, if diversity removal is to become a reality.

I think this has been very enlightening and exceedingly helpful.

I would like to have you comment very briefly though, Professor, on one problem, and that is this: Do we see—and if so, in what degree—a great deal of litigation over the issue of whether or not there is complete diversity?

Do we see a little bit of slugging out between the parties to try to implead addition parties to avoid full diversity in many instances; and therefore, if we remove diversity, do we remove an area in which there is perhaps some unnecessary litigation?

Mr. MEADOR. I think the answer is yes. It's hard to quantify. I'll just mention two or three things.

For example, if you pick up any of the treatises or textbooks on Federal jurisdiction and turn to the portions dealing with the diversity of citizenship jurisdiction, you will find a sizable section, a sizable proportion, of the entire work devoted to that subject. And in those pages, the authors deal with the technical complexities of the diversity jurisdiction; questions of where the person is a citizen, whether an administrator's citizenship is determinative, and so on. The same holds true for law school teaching books on diversity jurisdiction, great clumps of pages devoted to that subject.

Now, I think Prof. Thomas Rowe's paper portrayed the range of issues that do get litigated and can get litigated. He didn't quantify and say how many or what, but there's a fairly impressive showing that diversity jurisdiction creates litigation on subsidiary issues.

I can recall numerous situations, the ones I've known about myself where there were difficult litigating problems. The fourth circuit, for example, went through a series of cases over a period of years, dealing with administrators and so on, trying to rewrite the law, so to speak, to make it more sensible to determine citizenship in those cases. I do think there is a significant slice of time, taken as a whole, in the Federal judiciary that goes to these peculiar diversity questions.

Mr. GUDGER. May I ask one very brief question, and that is this: Professor Meador, we see the proposition argued occasionally that it is difficult for a litigant to get justice in a particular county structure or in a particular local State jurisdiction because of prejudice, because of perhaps the extreme popularity of the opposing litigant, or perhaps because of race or any number of causes that may be peculiar to that little community, that jurisdiction where that case is going to be tried.

Now, is it the obligation of the State to provide a change of venue provision where the prejudice exists because of an excessively enthusiastic press, or because of any particular local bias?

Is it the responsibility of the State to provide a method of change of venue to get a fair jury, or is it more for the Federal Government to provide some machinery whereby there can be removal within the discretion of the Federal court. Perhaps this could be made an alternative, if we abolish diversity?

Mr. MEADOR. Well, I would think that the first line of obligation here, as in many things, lies in the States. After all, we are dealing with State law cases, which—all things considered—generally belong in the State courts. And it's incumbent on the States to design a judicial structure and a judicial procedure to provide a forum for a controversy that is as fair as we can make it, given human conditions. That is a matter properly addressed, in the first instance, by the State legislatures or the State judiciary insofar as rulemaking procedures may apply. Failing that, it is not improper in my judgment for the Federal authority to focus on the problem; and if a rational remedy in alternative form can be provided within the framework of article III, it seems that is not an improper approach to take.

Our point here is not that it's improper in all circumstances to provide a Federal forum for a State law case. If there are special circumstances, as I said in answering Mr. Sawyer's question, thought could be given to trying to design a carefully tailored means to deal with those situations. But I would certainly want to focus first on the State courts.

I want to emphasize something here that is in my written statement that I filed today. I tried to spell out there some information to show that the State court systems are progressively getting better. The picture today is so much better than it was 25 years ago that it's wholly misleading to think of the State courts in terms of a generation ago. In the written statement, I have listed a number of developments—and there are others—all pointing toward an even-higher quality of state judiciary in terms of the judges, the procedures, the administration, the funding—in almost all respects. State courts, as a whole, are improving, and I think the improvement is bound to continue.

Mr. GUDGER. Thank you very much, Professor Meador.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Yes.

I will withhold my several questions. I can either present them in a letter or by some other means.

[By letter. Mr. Kastenmeier subsequently addressed 4 questions to Mr. Meador. The written response follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENT IN THE ADMINISTRATION OF JUSTICE,
Washington, D.C., June 25, 1979.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: This is in response to your letter of April 27, 1979, in which you make several inquiries relating to pending legislation which would abolish the general diversity of citizenship jurisdiction and which would expand the jurisdiction of magistrates in the federal courts. The question concerning magistrates has been answered under separate cover. The questions that you have asked concerning diversity are each set forth below with our response following.

Question Number 1. Could you provide further statistical data, with citation of authority, on comparative delays in resolving civil cases in State and Federal Courts?

Response. Caseload data for the federal courts are found in the Annual Report of the Director, Administrative Office of the United States Courts. That annual volume analyzes civil and criminal caseloads in federal trial and appellate courts. Data relating to case processing time is included. More refined data may be obtained upon request from the Administrative Office.

State data, on the other hand, are not so readily available. The National Center for State Courts is in the process of establishing data bases and is expected to have useful data in the future. For the present, however, the only general source is the State Court Caseload Statistics: Annual Report 1975, which is currently being published. It contains very little information with respect to case processing time. A recent report prepared by the National Center for State Courts, entitled *Justice Delayed*, however, contains some data dealing with case processing time in some state court systems. Other than that publication, there is very little information available.

Regrettably, data purporting to compare delays in the state and federal courts have sometimes been cited before the Congress without full appreciation of its limitations or its sources. An example can be found in testimony in early March of this year before your subcommittee in opposition to H.R. 2202. Data were cited that suggested that delays in the state courts in five urban areas (Boston, Manhattan, Brooklyn, Chicago, and Philadelphia) were, on average, nearly twice that in the comparable federal district court (41 months in state court; 22 months in federal court.)¹ A careful analysis reveals, however, that the data cited were not comparable, and in one instance, where more reliable data are available, the data were completely inaccurate.

The apparent source for the data was testimony before your subcommittee in the 95th Congress.² In that testimony, the source for the state data was a report from the Institute for Judicial Administration. The data reported were for calendar year 1974, included personal injury cases only, and apparently measured the average delay from the filing of complaint to the termination of the case. The federal data, on the other hand, included all jury trial cases in 1976, and the period of time measured was the median time from "issue" to trial.³ Clearly, any attempt to compare data of two distinctly different case types in two different years is meaningless. It is even more meaningless to compare elapsed times measured from different stages of litigation. Further, we have been advised by a former Director of the Institute for Judicial Administration—the source for the state data—that the Institute had so little confidence in the accuracy of its data that it has ceased promulgating them.

Finally, in one of the jurisdictions cited, more reliable data present a completely different picture. In the data cited above, it was reported that the delays in the Boston state courts were 42 months, while the delay in the federal district court for Massachusetts was 34 months. (As we noted above, different periods of time were measured.) Statistics for 1976 which reflect the median time between the filing of the complaint and disposition in both Boston (Suffolk County

¹ Testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, March 1, 1979 (Statement of Rep. Dan Glickman; oral remarks of Mr. Robert Begum).

² Diversity of Citizenship/Magistrate Reform: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on Judiciary, 95th Cong., 1st Sess. 234 (1977) (Statement of John P. Frank).

³ Administrative Office of United States Courts, Annual Report of the Director, Table C-10 (1976).

Superior Court) and the federal district court for the District of Massachusetts reveal, however, that the delay in the Boston court was 394 days (13 months)⁴ while the delay in the federal court was 690 days (23 months).⁵ Thus, the relative delays in those two courts were the opposite of what the earlier data reported. Until more comprehensive data bases can be established for the state court systems, any comparisons between state and federal courts will be questionable.

Such data as there are, however, indicate that there is no nationwide pattern. In some states delays in state courts are longer than in the federal courts, and in others the delays in the federal courts are longer.

Question Number 2. A multi-person injury exception to the diversity legislation has been suggested. What are your feelings about this? Could you provide the subcommittee with amendatory language?

Response. Although we support abolition of the general diversity jurisdiction, we recognize that in certain situations there is a substantial functional justification, in light of contemporary needs, for making a federal forum available. Statutory interpleader is such a situation, and we support its retention in H.R. 2202. We have come to conclude that the so-called multi-person injury case should also be guaranteed a federal forum. Accordingly, we have drafted a proposal that would accomplish that end. It has been cleared by the Office of Management and Budget, and we urge that it be included as an amendment to H.R. 2202. A draft of the proposed amendment, with a section-by-section analysis, is attached as Appendix A.

Question Number 3. Assuming *arguendo* that there is residue bias against out-of-staters in certain State courts, would it be possible to draft legislation which would allow a Federal district court to retain adequate judicial authority to transfer, upon an adequate showing of bias, a case within a state judicial system?

Response. We have attempted to draft such a provision; however, certain constitutional objections have been raised which we have not yet been able to resolve. In the event we are able to develop a draft that would pass constitutional muster, we will forward it to you and the subcommittee.

Question Number 4. Is the diversity legislation constitutional?

Response. In our judgment, Congress clearly has power under the Constitution to eliminate all or part of the diversity jurisdiction. An opinion supporting that conclusion, prepared by the Department's Office of Legal Counsel, is attached as Appendix B.

I hope that these answers adequately respond to the questions you have raised concerning diversity. We have also concluded that H.R. 2202 should be amended to permit removal of certain cases filed in state courts where a substantial federal defense has been asserted. We have drafted a proposal that would provide for such removals, and it is attached as Appendix C. It draws heavily upon a proposal developed by the American Law Institute. The attached draft has been cleared by the Office of Management and Budget, and we urge that it be adopted as an amendment to H.R. 2202. We would not, however, support this provision if the general diversity of citizenship jurisdiction is not eliminated. If you have any other questions, I would be happy to answer them.

Sincerely,

DANIEL J. MEADOR,
Assistant Attorney General.

APPENDIX A

MULTI-PERSON INJURIES

SEC. 101. Chapter 85 of title 28, United States Code, is amended by adding the following section at the end thereof:

"§ 1364. Multi-person injuries

"(a) The district courts shall have original jurisdiction of any civil action arising out of a single event, transaction, occurrence or course of conduct that results in personal injury or injury to the property of twenty-five or more persons, if the sum or value of the injury to any twenty-five persons exceeds \$10,000 per person, exclusive of interests and costs, and

⁴ National Center for State Courts, *Justice Delayed* 94 (Appendix B) (1978).

⁵ Administrative Office of United States Courts, *Annual Report of the Director*, Title C-5 (1976).

"(1) is between a plaintiff who is a citizen of a state and any defendants, so long as any defendant and any person injured in the event, transaction, occurrence, or course of conduct is a citizen of a state different from that of any plaintiff; or

"(2) involves a party who is a citizen of a state and any adverse party which is a foreign state as defined in section 1603(a) of this title or who is a citizen or subject of a foreign state.

"(b) When an action has been commenced in any district court under the provisions of subsection (a), any person injured in the single event, transaction, occurrence or course of conduct which is the basis of the action brought shall be permitted to intervene as a party plaintiff in any such action notwithstanding that the action could not have been brought originally in a district court by such person.

"(c) When an action has been commenced in any district court under the provisions of subsection (a), any defendant in such action who is also a defendant in a civil action brought in a state court based upon the same single event, transaction, occurrence or course of conduct which is the basis of the action brought in the district court may remove the action to the district court of the United States for the district and division embracing the place where such action is pending even if the action is not otherwise removable pursuant to section 1441 of this title. The removal of an action pursuant to this subsection shall be made pursuant to the provisions of section 1446 of this title, except that where the state action is commenced prior to the commencement of the action in the district court the time within which the removal shall be made pursuant to section 1446(b) of this title shall run from the commencement of the action in the district court.

"(d) In any action over which the district court has jurisdiction pursuant to subsection (a) or subsection (c), the district court wherein the action is pending shall promptly notify the judicial panel on multi-district litigation of the pendency of any such action."

SEC. 102. Section 1391 of title 28, United States Code, is amended by adding the following new subsection at the end thereof:

"(g) A civil action where the jurisdiction of the district court is based upon section 1364 of this title may be brought in any district in which any defendant resides or in which a substantial part of the events or omissions giving rise to the claim occurred."

SEC. 103. Section 1407 of title 28, United States Code, is amended by adding the following subsection at the end thereof:

"(i) In actions transferred pursuant to the provisions of this section where the jurisdiction is based upon section 1364 of this title,

"(1) notwithstanding any other provision of this section, the transferee district court may retain actions transferred for determination as to liability. Those actions retained for determination as to liability shall be remanded to the district courts from which they were transferred for determination as to damages unless the court finds that for the convenience of parties and witnesses and in the interest of justice an action should be retained for determination of damages;

"(2) in order to ensure consistent results, the transferee court shall determine the source of the substantive law. The same substantive law shall be applied to all cases that were transferred to and originally filed in the transferee court, and in making the determination of the appropriate source of substantive law the transferee court shall not be bound by the choice of law rules which the transferor court or courts or the transferee court would otherwise apply in cases governed by state law.

"(3) if authorized by order of the transferee court upon motion for good cause shown, upon such terms and conditions as the court may impose, a subpoena for attendance at a hearing or trial may be served at any place within the jurisdiction of the United States, or anywhere without the United States if otherwise permitted by law."

SEC. 104. Chapter 113 of title 28, United States Code, is amended by adding the following section at the end thereof:

"§ 1697. Multi-person injuries

"In actions where the jurisdiction of the district court is based upon section 1364 of this title, process, other than subpoenas, may be served at any place throughout the jurisdiction of the United States or anywhere without the United States if otherwise permitted by law."

SECTION-BY-SECTION ANALYSIS

SEC. 101—JURISDICTIONAL PROVISION.—This section amends chapter 85 of title 28, United States Code, by adding a new section, 1364, which creates federal jurisdiction over cases involving multi-person injuries. Recourse to federal courts is made available to plaintiffs in actions in which injury to at least twenty-five or more persons or their property is alleged, so long as the value of injury to at least 25 persons exceeds \$10,000 per person. Any person injured in the single incident, regardless of the extent of his injury, may invoke the jurisdiction of the district court as long as the jurisdictional requirements relating to the number of persons injured, extent of injury, and citizenship of parties as required by subsection (a) are met.

It is intended that the rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)—which requires complete diversity as the basis for federal jurisdiction—shall not apply to actions brought pursuant to this section. The touchstone of the jurisdictional requirement provided by this section is minimal diversity which the Supreme Court has held is enough to meet the requirements of the Constitution. *State Farm Fire & Insurance Casualty Co. v. Tashire*, 386 U.S. 523 (1967).

Paragraph (1) of section 1364(a) confers jurisdiction on a federal district court to hear multi-person injury cases if there is minimal diversity between any plaintiff and any defendant, and diversity between any plaintiff and any other person injured in the incident. Thus, assuming the requisite number of injured persons meet the jurisdictional amount, an injured person could invoke the jurisdiction of the federal court so long as at least one defendant and at least one other person injured in the incident is from a state other than that in which the injured person resides. The purpose of this jurisdictional basis is to provide broad access to federal courts in cases in which multi-person injuries occur while at the same time eliminating from the court's jurisdiction those occurrences of a purely local nature, which would be better litigated in state courts.

Paragraph (2) of section 1364(a) confers federal district court jurisdiction in multi-person injury cases if any party is a citizen of a state and any adverse party is a foreign state or a citizen or subject of a foreign state. The inclusion of this provision is intended to preserve the deference historically shown sovereign entities and their citizens in the courts of the United States.

Subsections (b), (c), and (d)

The purpose of section 1364 of title 28 is to provide a common forum for all cases arising out of major incidents causing injury to numerous persons where minimal diversity exists. Once all the cases have been filed in or removed to the district court it is anticipated that consolidation of the cases would occur pursuant to the provisions, as amended, of section 1407 of title 28 dealing with multi-district litigation. It is expected that nearly all of the cases arising from the incident would be brought in or removed to the district court based upon the jurisdictional grant of subsection (a). In some instances, however, subsection (a) will not provide for district court jurisdiction for every person injured. For example, a plaintiff who is a citizen of the same state of every defendant could not bring his action in the district court pursuant to subsection (a) unless he joined as plaintiff with another injured party who was either a citizen of a different state or an alien. In some instances joinder at the outset is not feasible; accordingly, subsection (b) allows an injured person who could not ordinarily bring the action in the district court, an unqualified right to intervene as a party plaintiff in a pending case where jurisdiction is proper pursuant to section 1364(a).

Similarly, subsection (c) permits any defendant to remove a case, that would not otherwise be removable, to the district court so that it can be consolidated with all of the other cases arising out of the same incident. The second sentence of this subsection provides that removal shall be made pursuant to the procedures set forth in section 1446 of title 28; however, the time limitation of section 1446(b) would commence to run only after an action is filed in the district court. Thus a defendant, in a case filed in a state court, would not be barred from removing the case to the district court if the district action were not filed until after the thirty-day period set forth in section 1446(b) had expired. Rather, the thirty-day period would not commence to run until an action had been filed in a district court.

Subsection (d) requires that upon the filing of or the removal to a district court of any action, whose jurisdiction is based upon this section, the district court wherein the action is pending shall promptly notify the judicial panel on

multi-district litigation. It is expected that thereafter all cases pending in the district court based upon the jurisdictional grant provided by this section will be consolidated pursuant to the provisions of section 1407 of title 28. As a result, any case brought in or removed pursuant to this section or any case removed pursuant to section 1441 and section 1364(a) of title 28 shall be the subject of notification to the judicial panel on multi-district litigation by the district court.

SEC. 102—VENUE.—Section 1391 of title 28, United States Code, is amended by adding a new subsection, (g), which provides a venue provision for cases brought under section 1364 involving multi-person injuries. Venue is authorized in any judicial district where any defendant resides or where a substantial part of the events or omissions giving rise to the claim arose. This provision is similar to, but slightly broader than, the current venue provision for actions not founded on diversity of citizenship in section 1391(b) of title 28, United States Code. They differ mainly in that existing section 1391(b) creates venue where "all defendants" reside, whereas this section creates venue where "any defendant" resides. The broader venue scope that the language "any defendant" provides, along with the nationwide service of process provision (see section 104, *infra*), will allow potential defendants not living in the state where the action is filed to be brought in at the action's inception, thus avoiding a multiplicity of suits in different states.

SEC. 103—MULTI-DISTRICT LITIGATION.—The existing provisions of the multi-district litigation statute, section 1407 of title 28, United States Code, permit consolidation and transfer of cases pending in different judicial districts in which there are common questions of fact. Transfer is currently authorized for pre-trial proceedings only. This amendment would add a new subsection, (i), to section 1407 of title 28, United States Code, which would apply only to cases transferred involving multi-person injuries.

Paragraph (1) of subsection (i) authorizes the transferee district court to retain multi-person injury cases for findings as to liability, but requires the actions to be remanded to the transferor court for findings as to damages unless the court determines that in the interests of convenience and justice, the cases should be retained for all purposes.

Expanding the power of the transferee judge to include conducting a trial on the merits is preferable in several respects to the current requirement of a remand to the transferor court following pre-trial proceedings. First, having presided over complicated and protracted discovery proceedings and pre-trial motions, the transferee judge has already attained a degree of expertise in a complex matter that is wasteful to disregard.

Second, experience has shown that many transferee judges currently manage to retain actions for trial by transferring the cases to themselves at the conclusion of pre-trial proceedings through the change of venue provision in section 1404(a) of title 28, United States Code. This provision, however, restricts transfer to a district where the action could originally have been brought. By allowing the transferee judge to retain multi-person injury actions for trial, we merely codify current practice and eliminate the restrictions imposed by the 1404(a) transfer device.

Last, permitting the transferee court to try the case according to designated substantive law (see paragraph (2) *infra*) avoids the possibility of inconsistent adjudications on the merits.

Paragraph (2) requires the transferee court to determine the substantive law to be applied in the consolidated proceedings. It is expected that the transferee court shall make this choice based upon all the facts and circumstances available to it and that the same substantive law will apply to all cases consolidated. In making the determination of the appropriate substantive law, the transferee court will not be bound by the choice of law rules of the transferor court or courts or of the transferee court. This provision is aimed at avoiding inconsistent results due to the applicability of a variety of different state laws. Currently a transferee court is required to apply the law of the transferor state. See, *Van Dusen v. Barrack*, 376 U.S. 612 (1964). Further, the district court must follow the choice of law rule of the state where an action is brought. See *Klaxon v. Stentor Electric Manufacturing, Corp.*, 313 U.S. 487 (1941). In most instances, the consolidated case will include some cases that have been transferred and some that were originally brought in the transferee court. This provision will permit the district court to make a choice of law determination, that would be applied to all cases consolidated, without regard to the choice of law rule which either the transferor court or courts or the transferee court would otherwise apply.

Paragraph (3) authorizes the transferee court, upon motion, to issue a subpoena anywhere nationwide, or anywhere outside the United States where such service is otherwise permitted by law, for attendance at a hearing or trial. This provision enables the transferee court to bring all witnesses before it, thus avoiding the necessity of forcing the plaintiff to travel to the witnesses' location to take videotaped testimony, or otherwise inconvenience the efficient conduct of the proceedings.

SEC. 104—SERVICE OF PROCESS.—This provision amends chapter 113 of title 28, United States Code by adding a new section, 1697, which authorizes nationwide service of process or process outside the United States where otherwise permitted by law, other than subpoenas, in actions involving multi-person injuries. This provisions enables a plaintiff to join all defendants in a single action and subject them to service of process anywhere they may be located.

CONFORMING AMENDMENT

Section 1332(c) defines the place of citizenship of a corporation. A conforming amendment would be required to that section making the definition applicable to new section 1364 which is added by this title.

APPENDIX B

DEPARTMENT OF JUSTICE,
OFFICE OF LEGAL COUNSEL,
Washington, D.C., June 13, 1979.

MEMORANDUM TO ASSISTANT ATTORNEY GENERAL—OFFICE OF LEGISLATIVE AFFAIRS

This is in response to your letter of May 14, 1979 concerning S. 679 and H.R. 2202. You asked whether substantial or total abolition of diversity of citizenship jurisdiction would be unconstitutional.

The Constitution provides in Article III, Section 1, for one Supreme Court and "such inferior courts as Congress shall from time to time ordain and establish." Section 2, clause 1, of Article III establishes that "[t]he judicial Power shall extend . . . to Controversies . . . between Citizens of different States."

Respected commentators have documented that the original advocates of inclusion of diversity jurisdiction in the Constitution were not vociferous in their defense of it, Warren, *New Light on the History of the Federal Judicial Act of 1789*, 37 Harv. L. Rev. 49, 81-83 (1923), nor did they expect it to be necessary in all cases, Friendly, *The Historical Basis of the Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 487-88 (1928). Since the first Judiciary Act of 1789, section 11, 1 Stat. 73, 78, Congress has not vested the full range of jurisdiction in the lower federal courts. That act provided for diversity jurisdiction where the matter in dispute exceeded five hundred dollars. As suggested in *Wisconsin v. Pelican Inc. Co.*, 127 U.S. 265, 297 (1888), the Judiciary Act of 1789 was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous ad weighty evidence of its true meaning."

Justice Story, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), where it was not necessary to the decisions, did nevertheless expound on the proposition that the whole judicial power must be vested by Congress in some court of its creation. He elaborated on this theory in 2 J. Story, *Commentaries on the Constitution* § 1590, 395-96 (Cooley, 4th Ed. 1873).

Mandatory broad jurisdiction was soundly rejected by the Supreme Court in *Cary v. Curtis*, 44 U.S. (3 How.) 236, 244 (1845), where it was said that the judicial power of lower courts:

. . . although it has its origin in the Constitution, is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

The view taken by Justice Story was again repudiated in *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), which upheld the power of Congress to deny diversity jurisdiction over an assignment action that could not otherwise be brought in federal court.

It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this court since its first establishment. *Id.* at 448-49.

Years earlier the Supreme Court sustained the assignee clause of the Judiciary Act without directly addressing whether Congress failed in its duty by not vesting jurisdiction over these actions when between citizens of different states. *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799). Instructive is the expression of Justice Chase in argument of this case that “congress is not bound, and it would, perhaps, be expedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.” *Id.* at 10 n. 1.

Justice Story’s theory has continued to be denounced by commentators, including the eminent jurist, Judge Friendly, who wrote, in an article on *The Historical Basis of the Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 489 (1928), that “[n]ot only did the Constitution leave the state courts concurrent jurisdiction in case of diversity of citizenship, but it gave Congress the power to confer on the new judiciary as much or as little of this jurisdiction as it pleased.”

Throughout the nearly 200 years since creation of lower court jurisdiction, Congress has never required that every case between citizens of different states be able to be brought in federal court. Current law places a minimum limit of \$10,000 on diversity jurisdiction, 28 U.S.C. § 1332. The Supreme Court has never found Congressionally determined limitations to be constitutionally infirm and it is to late to challenge such a well-accepted principle of law. Therefore, we conclude that Congressional legislation totally or substantially abolishing diversity jurisdiction in the federal courts would without question be constitutional.

MARY C. LAWTON,
Deputy Assistant Attorney General,
Office of Legal Counsel.

APPENDIX C

FEDERAL DEFENSE REMOVAL

SEC. 101. Section 1441 of title 28, United States Code is amended by adding the following new subsection at the end thereof:

“(e) Except as provided in section 1445 of title 28, United States Code, any civil action brought in a State court may be removed by any defendant or any plaintiff to the district court of the United States for the district and division embracing the place where such action is pending if the amount in controversy exceeds the sum or value of \$25,000 exclusive of interests and costs, and if a defendant asserts a substantial defense arising under the Constitution, laws or treaties of the United States which, if sustained, would be dispositive of the entire action.”.

SEC. 102. Section 1445 of title 28, United States Code, is amended by adding the following subsection:

“(d) In addition to those actions described in subsections (a) through (c) of this section, the following civil actions otherwise removable pursuant to section 1441(e) of title 28, United States Code, shall not be removed from a State court to any district court of the United States:

"(1) A civil action in any State court by an employee to recover wages under section 216 of Title 29;

"(2) A civil action in any State court for injury to or death of a seaman under section 688 of Title 46;

"(3) A civil action brought by any State or a subdivision thereof, to enforce the Constitution, statutes, ordinances, or administrative regulations of such State or subdivision, or an action against a State, subdivision, or officer to require such enforcement;

"(4) A civil action for the condemnation of private property under State law or for the award of compensation therefor;

"(5) A civil action in which the only ground for removal is the defense that the defendant could not constitutionally be subject to process of the courts of the State;

"(6) A civil action in which the only ground for removal is the claim that the suit or relitigation of an issue in the suit is barred by an adjudication from another court that the Constitution or laws of the United States require the State court to honor or that the Constitution or laws of the United States require or forbid recourse to the laws of a particular State."

SECTION-BY-SECTION ANALYSIS

SEC. 101—ACTIONS REMOVABLE.—This section amends section 1441 of title 28, United States Code, by adding a new subsection, (e), which provides for removal of actions from a state court to the federal district court of the division where the action is pending, in cases where the defendant asserts a substantial federal defense.

The current federal question jurisdictional provision in section 1331(a) of title 28, United States Code, establishes federal jurisdiction in cases "arising under the Constitution." The courts have interpreted this provision to exclude actions in which the federal question is not raised on the face of the complaint. The abolition of diversity jurisdiction for parties from different states is founded on the notion that federal courts should be available principally for the vindication of federal rights. The concept of federal defense removal adheres to that policy by making the federal forum available for either party where an important federal question is raised as a defense.

The action may be removed by any defendant or plaintiff where the jurisdictional amount of \$25,000 is met. This jurisdictional amount requirement is necessary to prevent unfounded or frivolous defenses from being raised for the sole purpose of enabling a party to remove a case to federal court.

SEC. 102—ACTIONS NOT REMOVABLE.—This section amends section 1445 of title 28, United States Code by adding a new subsection, (d), which enumerates actions which, in addition to those currently listed in subsections (a), (b), and (c) of that section, are not removable where a substantial federal defense is alleged as the grounds for removal.

Paragraph (1) prohibits removal of actions brought by an employee to recover wages under section 216 of title 29, United States Code, the Fair Labor Standards Act.

Paragraph (2) bars removal of actions for injury or death of a seaman under section 688 of title 46, United States Code, the Jones Act.

Paragraph (3) prohibits removal of actions brought by a state or subdivision to enforce its laws or actions brought against a state or subdivision to obtain enforcement of its laws.

Paragraph (4) precludes removal of eminent domain actions brought under state law.

Paragraph (5) prevents removal of actions in which the basis for removal is the defendant's allegation that the state court could not constitutionally obtain service of process on him.

Paragraph (6) prohibits removal where the grounds for removal is the assertion that the actions is barred by a previous adjudication by the court of another state which must be given full faith and credit. Removal is also disallowed where it is alleged that the federal constitution or laws requires or prohibits adherence to a state's law.

These provisions are included to further the policy of keeping actions in state courts which are historically thought of as peculiarly within the state domain, or are so technical in nature that they are more appropriately litigated in state courts.

Mr. KASTENMEIER (continuing). We have another vote, and I think it's only fair to conclude today's hearing at this hour. The hour is late.

Mr. Meador has been very patient, and members have been very good about returning after votes, but we will conclude at this moment. And I wish, again, to express my own personal thanks and that of the subcommittee for Mr. Meador's appearance again here today.

And we will perhaps have an opportunity to at least explore aspects of this at some future time, as is necessary.

Mr. MEADOR. We'll be glad to respond in writing if you have any other questions.

Mr. KASTENMEIER. Thank you.

That concludes today's hearings.

[Whereupon, at 5:05 p.m., the hearing was adjourned.]

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APPENDIXES

Diversity of Citizenship Jurisdiction

APPENDIX I—ADDITIONAL STATEMENTS

(a)

AMERICAN CIVIL LIBERTIES UNION,
Washington, D.C., March 27, 1979.

HON. ROBERT W. KASTENMEIER,
*Rayburn Building,
Washington, D.C.*

DEAR REPRESENTATIVE KASTENMEIER: We understand that the Subcommittee on Courts, Civil Liberties and the Administration of Justice is planning to consider H.R. 2202 and H.R. 1046 at markup this week. We would like to take this opportunity to convey the position of the American Civil Liberties on these bills.

A. ABOLITION OF DIVERSITY JURISDICTION AND AMOUNT-IN-CONTROVERSY

The ACLU urges the Subcommittee to favorably report H.R. 2202, which would abolish diversity jurisdiction and the amount in controversy requirement in federal question cases. As an organization dedicated to the enforcement of federally-protected rights, the ACLU shares the concerns of the Subcommittee about the workload and delay in the federal court system, since these conditions often infringe on the ability of civil rights-civil liberties litigants to have their claims heard. Of more importance is the fact that we oppose unnecessary technical and financial barriers which limit the ability of citizens to enforce their federal rights in federal courts. Accordingly, the National Board of the ACLU has adopted the following policy:

"ACLU supports legislation to open federal courts to direct access to all federally based claims of civil rights and civil liberties without regard to any amount of controversy. ACLU opposes the use of doctrines such as exhaustion, comity and abstention to require such litigation first be presented to state or other local courts.

"If such access to federal courts for civil rights and civil liberties cases cannot be provided without reduction of other jurisdiction of federal courts, ACLU would favor such reduction of other jurisdiction."

Because claims based on diversity jurisdiction do not involve the enforcement of federally protected rights, the elimination of diversity jurisdiction represents an effective way to reduce federal court workload. To do so is also consistent with our approach to access to justice issues which has as its primary objective the protection and expansion of federal court jurisdiction over civil rights and civil liberties matters.

We urge the Subcommittee to favorably consider a single amendment to Section 4 of H.R. 2202 to make the repeal of the amount in controversy requirement in federal question cases effective as to all cases pending on the date of enactment. Such a change would assure that no further litigation of this jurisdictional issue is necessary and thus will result in a savings of judicial resources as well as immediate benefits to federal question litigants.

B. EXPANSION OF MAGISTRATES' JURISDICTION

The ACLU would like to commend the Subcommittee for the improvements in legislation expanding the civil and criminal jurisdiction of magistrates. In January 1978, we proposed several amendments to resolve the major concerns which we had expressed regarding S. 1613, legislation then pending before the Subcommittee. These amendments were adopted by the Subcommittee and are

now incorporated into H.R. 1046. We are pleased that the legislation provides for totally consensual jurisdiction in civil cases and criminal misdemeanor cases. Procedures to assure knowing and voluntary consent are, in our view, essential to the acceptability of expanded magistrate jurisdiction. H.R. 1046 treats this enlargement of magistrate authority in a manner preferable to that used in the current Senate version, S. 237. We will present testimony to the Senate Judiciary Committee this week urging the Committee to conform the provisions of S. 237 to those of H.R. 1046.

It is our belief that passage of H.R. 2202 and H.R. 1046 will aid congressional efforts to improve the operation of the federal judiciary and enable legislation which will more directly improve access to justice for civil liberties litigants—such as reform of standing requirements, expansion of § 1983 liability and class action reform—to be enacted.

We are grateful for the subcommittee's consideration of these suggestions and we are looking forward to working with you on these and other matters in the months ahead.

Sincerely,

JOHN H. F. SHATTUCK,
Director.
KAREN CHRISTENSEN,
Legislative Counsel.

(b)

AMERICAN COUNCIL OF LIFE INSURANCE,
Washington, D.C., March 21, 1979.

Re H.R. 2202, a bill "To abolish diversity of citizenship as a basis of jurisdiction of Federal district courts, to abolish the amount in controversy requirement in Federal question cases, and for other purposes."

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to you on behalf of the American Council of Life Insurance to present the views of the Council on the bill H.R. 2202. The Council has a membership of 484 life insurance companies which have 95 percent of the life insurance in force in the United States.

The Council is opposed to section 1 of H.R. 2202 which would amend 28 U.S.C. section 1332 to abolish diversity of citizenship as a basis of jurisdiction of Federal district courts. The right of a party to litigate in a Federal district court, when diversity requirements are met, as well as in the state court is a valuable right of civil litigants which should be preserved.

Federal courts in diversity of citizenship cases provide litigants with procedural advantages that are not and cannot be provided by a state court. For example, the federal system provides the machinery for the 100 mile extra-territorial service of process, the 100 mile "bulge" available to subpoena witnesses, and allows pretrial discovery in any one of the U.S. Districts without resorting to supplemental proceedings in state courts. Another advantage of the federal courts is that it provides an out of state litigant with a court that has familiar procedures rather than a local court where the procedures may be different and unknown.

H.R. 2202 would require life insurance companies to litigate nearly all cases in state courts and subject them to greater risk of local prejudice. While the causes of prejudice may have been reduced between individual persons, local prejudice and distrust of the outsider still exist in certain rural areas and metropolitan centers, particularly when a large out of state corporation is in litigation against a local individual. State judges who are elected in their districts and juries which are selected from the smaller state districts may have many more temptations to favor a local resident over a litigant from outside of the state.

H.R. 2202 would effectively eliminate the federal removal option for most life insurance companies. The present diversity rules are working well, and there is no demonstrated need for this drastic change. In many instances the Federal district courts are in a better position, because of less crowded dockets and a variety of other reasons, to provide more efficient and satisfactory handling of litigated matters.

As a result of the bill, a much greater volume of cases would wind up in the state courts, increasing the financial and administrative burdens on state and local governments. They are already struggling under their current responsibilities and are less able and probably less willing than the Federal government to bear the increased costs. In most instances this will result in less efficient and less uniform administration of justice.

For these reasons, we recommend that the provisions in H.R. 2202 to abolish diversity of citizenship jurisdiction be deleted from the bill.

We respectfully request that this letter be included in the printed record of the hearings on H.R. 2202.

Sincerely yours,

LINWOOD HOLTON,
Vice President and General Counsel.

(c)

AMERICAN INSURANCE ASSOCIATION,
Washington, D.C., April 2, 1979.

Re H.R. 2202.

Mr. MICHAEL REMINGTON,
Majority Counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR MR. REMINGTON: The American Insurance Association is a voluntary trade association of 147 stock property and casualty insurance companies. Our member companies, as major property and liability insurers, are involved in a large number of law suits. Accordingly, any changes in the legal system, either federal or state, which would modify present procedure for the trial of controversies impacts our members.

We would like to register our opposition to H.R. 2202.

Historically, the purpose of diversity jurisdiction has been to allow out-of-state litigants to avoid local prejudice. This purpose is accomplished by allowing out-of-state plaintiffs to bring actions originally in federal district court and by allowing out-of-state defendants to remove actions from state to federal court.

The value of this access is recognized in the United States Constitution which provides in Article III that "[t]he judicial Power shall extend . . . to controversies . . . between Citizens of different States" The Supreme Court itself has stated in *United States v. Deveux*, 9 U.S. (Cranch) 61, at 87:

" . . . However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to the parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between . . . citizens of different states."

We are not convinced that the reasons for diversity jurisdiction no longer exist. The potential for local prejudice is particularly predominant in personal injury cases where there is a corporate defendant. Product manufacturers and insurers named in direct action suits have become the source of increasingly larger awards for plaintiffs. Access to federal district courts provides a necessary device to attorneys who represent insurance consumers who seek to avoid this prejudice. If the federal courts are closed to these litigants, the result will be a more rapid expansion of liability and increasingly larger awards, inflating the cost of goods and services and contributing to current insurance availability and cost problems.

We also question whether H.R. 2202 alone is sufficient to eliminate diversity jurisdiction in light of the mandatory language of Article III of the United States Constitution which requires that "[t]he judicial power *shall* extend . . . to Controversies . . . between Citizens of different States . . ." (emphasis added). We have seen no legal research indicating that legislation such as H.R. 2202, without a constitutional amendment would eliminate diversity jurisdiction. Indeed, we question whether these bills themselves are not constitutionally infirm because in direct violation of an express constitutional mandate.

We support the goal of decreasing the burdensome case load in the federal courts. Any changes which would simplify or expedite the resolution of controversies would insure to our benefit, both as litigants and as taxpayers who

share the cost of support our system of federal courts. We strongly believe, however, that abolishing the diversity jurisdiction of the federal district courts is not the proper way to achieve this goal because of continuing local prejudice against certain litigants and because of the constitutionality of such a change is unclear.

Arguments in favor of H.R. 2202 center around the need to relieve the increasing case load of federal district courts. We believe this purpose can be accomplished more easily by simply increasing the amount in controversy in such cases from \$10,000 to \$50,000.

For the foregoing reasons, the American Insurance Association must respectfully oppose passage of H.R. 2202 and suggests raising the jurisdictional amount requirement to \$50,000 as an alternative approach to reducing congestion in the federal district courts.

Respectfully submitted.

LANA AMANS, *Attorney.*

(d)

ASSOCIATION OF AMERICAN RAILROADS,
Washington, D.C. March 8, 1979.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Association of American Railroads (AAR) wishes to register its opposition to H.R. 2202, a bill to abolish diversity of citizenship as a basis of federal court jurisdiction. The AAR is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico.

H.R. 2202 is nearly identical to H.R. 9622, a bill which was introduced in the 95th Congress. The AAR voiced its opposition to H.R. 9622 in the attached letter of March 29, 1978 to Chairman DeConcini of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery. In that letter we also stated our support for and endorsement of the statement submitted on H.R. 9622 by the National Association of Railroad Trial Counsel (NARTC) in a letter sent by that Association to Chairman DeConcini on March 13, 1978. Copies of the AAR and NARTC statements are attached.

We urge that H.R. 2202 be rejected.

Sincerely,

HARRY J. BREITHAUP.

Attachments.

ASSOCIATION OF AMERICAN RAILROADS,
Washington, D.C., March 29, 1978.

HON. DENNIS DECONCINI,
Chairman, Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the Association of American Railroads, I would like to register our opposition to H.R. 9622, a bill which (1) would abolish diversity of citizenship as a basis of federal court jurisdiction and (2) would abolish the amount in controversy requirement in federal question cases.

The Association of American Railroads (AAR) is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico. These railroad companies operate 92 percent of the linehaul trackage, employ 94 percent of the workers, and produce 97 percent of the freight revenues of all railroads in the United States. The AAR believes that the provisions of H.R. 9622 which would remove diversity as a basis for federal court jurisdiction are unwise and contrary to the best interests of justice.

The principal justification of proponents for H.R. 9622 is that diversity-based jurisdiction is simply no longer needed. The railroad industry is of the position that diversity continues to serve a useful purpose by protecting out-of-state individuals and—more significantly for our purposes—out-of-state corporations such local prejudice. Attorneys representing the railroad industry believe that such local prejudice or bias continues to exist despite the reports of many witnesses in hearings held by the Subcommittee that bias against out-of-state par-

ties no longer exists in the state court systems. Removal under 28 U.S.C. § 1441 continues to be a useful tool (1) in avoiding the emotional environments sometimes accompanying suits brought against railroads as a result of grade crossing accidents, for example, as well as (2) in conjunction with 28 U.S.C. § 1404(a) with respect to the transfer of suits from locations which have no practical relationship to the object of the suit to more reasonably located areas. The state court systems are unable to adequately address these situations, especially as they affect large corporations such as railroads.

Additional points raised by proponents of H.R. 9622 are that federal court judges must "guess" at state law and that the state courts can easily handle the increased load. In response we argue that federal judges in most instances have previously practiced at the state level and have appropriate means available for determining state law with which they are unfamiliar. No resort to "guessing" is necessary. Further, the state courts in many cases are as congested, or even more congested, than the federal courts. The most congested state courts will receive the larger share of the diversity cases thrown to the states.

Finally, the AAR supports and endorses the statement submitted on H.R. 9622 by the National Association of Railroad Trial Counsel (NARTC) in a letter sent by Stephen A. Trimble, the President of that organization, to Subcommittee Chairman Dennis DeConcini on March 13, 1978. The NARTC letter spells out, in a more detailed fashion the position of the railroad industry on H.R. 9622.

We urged that H.R. 9622 be rejected.

Sincerely,

HARRY J. BREITHAUPT, Jr.

(e)

[From the Record of The Association of the Bar of the City of New York vol. 33, No. 8, November 1978]

FEDERAL DIVERSITY JURISDICTION*

(By the Committee on Federal Legislation, the Association of the Bar of the City of New York, New York, N.Y.)

A number of legislative proposals have been made to abolish or reduce the diversity jurisdiction of the federal courts. On February 28, 1978 the House of Representatives passed H.R. 9622 providing for abolition of diversity jurisdiction;¹ that bill (S. 2389) and another (S. 2094) providing for somewhat less sweeping reductions are presenting pending in the Senate.

After study of the issues, our Committee has concluded that diversity jurisdiction has served our nation well and that convincing proof of the need for change is lacking. Although our views are set forth more fully later in this report, we note, by way of summary, that prime among our reasons for believing that the present legislation is unwise are: 1) the fear of sectional bias, which seems to be one of the factors responsible for the original grant of diversity jurisdiction, has by no means been shown to be illusory today; 2) the benefits provided by a nationwide system of federal courts, well-equipped in terms of procedures and resources to deal with modern disputes which stretch across state boundaries and frequently involve citizens of many states, are considerable; and 3) any overcrowding of the federal courts, offered as a major justification for the proposed reduction or abolition of federal diversity jurisdiction, can better be dealt with in other ways which do not impair the benefits provided by diversity jurisdiction.

For these and other reasons set out in this report, we believe that substantial alteration of diversity jurisdiction is unwarranted; accordingly, we oppose the pending legislation embodied in H.R. 9622, S. 2389 and S. 2094.

I. INTRODUCTION

Jurisdiction over controversies between citizens of different states has been an element of the jurisdiction of the federal courts since the enactment of

*This report has been distributed to members of the Congress and interested executive departments and agencies.

¹ 124 Cong. Rec. H. 1569 (daily ed. Feb. 28, 1978).

the Judiciary Act of 1789.² The exercise of such diversity jurisdiction by the "inferior" federal courts is specifically authorized, but not mandated, by Article III of the Constitution.³

The precise rationale for diversity jurisdiction is obscure and the historical evidence is minimal.⁴ The initial concept of federal diversity jurisdiction probably arose from one or more of several related concerns: a fear that state courts would be biased against those from out-of-state generally;⁵ a more particularized fear that state courts might be less fair to interests of out-of-state creditors;⁶ or a conviction that the federal courts were potentially superior to the state courts then in existence and that it was beneficial to direct more cases to the federal courts.⁷

Throughout much of the last century and the early years of this century diversity cases were decided, in accordance with the holding of *Swift v. Tyson*,⁸ by the application of federal common law rather than the law of each of the states, which would have been applied but for the accident of diversity. This changed with the Supreme Court's decision in *Erie R.R. v. Tompkins*,⁹ and state substantive law now governs in diversity suits. Also during this century, sources of dissatisfaction with the substantive holdings of the federal courts in labor disputes¹⁰ and other areas of significant concern to emerging state economic policies were eliminated by a variety of federal enactments.¹¹ Nevertheless, and particularly as the volume of federal question litigation in the federal courts has grown, there have been a number of suggestions that diversity jurisdiction should be restricted or abolished.¹² The legislation commented upon in this report reflects a number of those suggestions.

II. THE CURRENT LAW

The basic grant of diversity jurisdiction to the federal district courts is today contained in 28 U.S.C. § 1332, which vests the district courts with orig-

² Ch. 20, 1 stat. 73 (1789). The Judiciary Act was drafted and debated by many of those who participated in framing the Constitution. See *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57-130 (1923). The statute created a system of inferior federal courts, including at least one district court for each state and three circuit courts, the latter possessing the original jurisdiction of some diversity cases, "concurrent with the courts of the several states." Ch. 20 § 11, 1 stat. 73 (1789). 1875 Legislation broadened the scope of diversity-type cases within the circuit courts' original cognizance. Judiciary Act of 1875, ch. 137, § 1, 18 stat. 470 (1875). In 1891, further procedural modifications were made in the Circuit Court of Appeals Act, ch. 517, 26 stat. 826 (1891). This act created courts of appeals for each circuit, which became the only circuit courts when the 1911 Judicial Code abolished the original circuit courts and transferred diversity and other types of cases to the district courts. Judicial Code Act of 1911, ch. 231, 36 stat. 1087 (1911).

³ U.S. Const. art. III § II.

⁴ Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 487 (1928); Moore and Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1 (1964); 13 C. Wright and A. Miller, *Federal Practice and Procedure* § 3601 at 573 (1975); see also Frank, *For Maintaining Diversity Jurisdiction*, 73 Yale L.J. 7, 9 (1963).

⁵ See, e.g., *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 87 (1809). "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

⁶ Friendly, *supra* n. 4, at 498-99.

⁷ In *Federalist* No. 81, Hamilton observed "every man may discover that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union."

⁸ 41 U.S. (16 Pet.) 1 (1842).

⁹ 304 U.S. 64 (1938).

¹⁰ See discussion in Statement of John P. Frank, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, Hearings on Diversity of Citizenship, 95th Cong., 1st Sess. at 232 (1977) (hereinafter "House Hearings").

¹¹ *Id.*

¹² See, e.g., Friendly, *Federal Jurisdiction: A General View* 139-52 (1973); Bork, *Dealing with the Overload in Article III Courts*, 70 F.D.R. 231, 236-37 (1976); Burger, *Annual Report on the State of Judiciary*, 62 A.B.A.J. 443 (1976); Friendly, *supra* n. 4, at 483, 492-97, 510 (1928); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499 (1928). Chief Justice Burger has said that there is likely to be so much additional jurisdiction thrust on the federal courts over the next decade that they will do well to perform those functions alone without having to handle diversity cases as well. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures, Recommendations for Change, App. D. at 176 (1975); Letter from Chief Justice Warren E. Burger to Senator Roman L. Hruska, May 29, 1975, referred to in Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 Ind. L.J. 247 (1976). A useful listing of the large body of commentary relating to the debate over retention of diversity jurisdiction is set forth in 13 C. Wright and A. Miller, *Federal Practice and Procedure* § 3601 (1975).

inal jurisdiction in civil actions where the amount in controversy exceeds \$10,000 and where the litigants are citizens of different states or citizens of a state and a foreign country. This jurisdiction is concurrent with that of the several states.

The decision as to whether or not to bring a suit in federal or state court is, of course, in the first instance, for the plaintiff; a plaintiff's decision to sue in state court is not necessarily conclusive, however. Where a defendant, not a citizen of the forum state, is sued in the courts of that state, he may remove the case to the federal district court for the judicial district in which he was sued if original jurisdiction could have been exercised by the district court because the litigants were of diverse citizenship.¹³ By statute, such removal is not available to a defendant sued in a state of which he is a citizen, notwithstanding the fact that he and the plaintiff are of diverse citizenship.*¹⁴

III. THE PROPOSED LEGISLATION

(1) S. 2389

Two principal proposals are pending before the Senate at this time. The first, S. 2389, is the Senate counterpart to H.R. 9622 which was passed by the House of Representatives on February 28, 1978. This bill provides for what is, in essence, a total abolition of the present diversity jurisdiction as between citizens of the United States. Excepted from this abolition are suits involving citizens of foreign nations. In these latter cases, referred to in the legislation as "alienage" cases, the minimum amount in controversy required for federal jurisdiction would be raised from \$10,000 to \$25,000. Also substantially unaffected by the present bill is the grant of interpleader jurisdiction (stakeholder claims) under 28 U.S.C. § 1335. The diverse citizenship of claimants thus remains a basis for a stakeholder to assert jurisdiction under this provision.

The bill, however, modifies the basic venue provisions of federal law.¹⁵ It provides that any civil action over which federal jurisdiction would exist may be brought in the judicial district where all plaintiffs or all defendants reside, or where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." This would expand federal question venue to make the district of plaintiff's residence a proper location for the action and it would replace the present narrower phrase "in which the claim arose" with the expansive definition of location quoted above; this expansive definition of location had previously been adopted for other aspects of venue, but not for that pertaining to federal question matters.¹⁷

In a related and significant matter, S. 2389 also would expand federal jurisdiction as to "federal questions" cases by eliminating entirely the \$10,000 jurisdictional requirements of 28 U.S.C. § 1331.

(2) S. 2094

A second and narrower bill was originally proposed by the Department of Justice. The Department continues to sponsor this bill, S. 2094, but also has indicated that the broader S. 2389 would be acceptable to it.¹⁸

S. 2094 provides that the scope of jurisdiction over diversity cases be retained as a definitional matter, but that such jurisdiction may not be invoked by a plaintiff in any federal court located in a state of which he is a citizen. Plaintiffs could still invoke diversity jurisdiction in states other than those of which they are citizens, while defendants would remain free to remove cases brought in the state courts when they are not citizens of such states and where diversity of citizenship exists. This would allow removal to federal court by a defendant of an action brought by a plaintiff who could not himself have brought it in federal court.

¹³ 28 U.S.C. § 1441(a) (1970).

¹⁴ 28 U.S.C. § 1441(b) (1970).

*For purposes of all of the provisions discussed above, a corporation is a citizen of the state of its incorporation and of the state in which it maintains its principal place of business.¹⁶

¹⁵ 28 U.S.C. § 1332(c) (1970).

¹⁶ 28 U.S.C. § 1391 (1970), as amended, Acts of Oct. 21, 1976, Pub. L. Nos. 94-574, 94-583, 90 stat. 2721, 90 stat. 2897.

¹⁷ See 28 U.S.C. § 1391(f) (1970), as amended, Act of Oct. 21, 1976, Pub. L. No. 94-583, 90 stat. 2897.

¹⁸ Statement of Daniel Meador, Ass't Att'y Gen., Office for Improvements in the Administration of Justice, Dep't of Justice, Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. (1978) (hereinafter "Senate Hearings").

Under the bill, venue for the surviving diversity actions and federal question matters would be made identical, both being government by the present standards for federal question matters, which ordinarily may be brought only in the district where all defendants reside, or in which the claim arose."¹⁹

(3) Other Proposals

During the course of hearings on the proposed legislation, several alternative proposals and amendments have been suggested by those appearing before the Subcommittee on Improvements in Judiciary Machinery of the Senate Committee on the Judiciary. The suggestion has been made by a spokesman for various media groups that, in light of the increasing significance of constitutional law in areas such as privacy and defamation, federal question jurisdiction be expanded to cover federal or constitutional matters raised by the defendant by way of defense if the general diversity basis for entertaining cases in the federal courts is to be abolished.²⁰ Another proposal, put forward by a public interest law group, is to retain diversity jurisdiction over mass tort actions involving claimants of many states.²¹

In 1969, the American Law Institute, in an extensive study of the area, had concluded that plaintiffs should be barred from suing under diversity jurisdiction in their home states and individuals should be barred from suing as plaintiffs or removing under diversity to federal courts in a state in which they maintain a business or are employed or, in the case of a corporation, where it maintains a "local establishment."²² The ALI proposal also would have expanded diversity jurisdiction in several respects, however, most notably by (i) eliminating the requirement of complete diversity as a precondition to removal by an out-of-state defendant, (ii) eliminating the jurisdiction-defeating effect of the joinder of parties other than real parties in interest, and (ii) extending jurisdiction to multi-party cases where the process of any one state court cannot reach all parties and where there is diversity between at least some adverse parties.²³ Each of these proposals, as well as the pending bills, has been the subject of some discussion in the present Senate hearings.²⁴ This report focuses on the two bills introduced; reference to the other suggestions will be made as they relate to an evaluation of the pending legislation.

IV. THE ARGUMENTS FOR AND AGAINST THE LEGISLATION

Those favoring abolition of diversity jurisdiction or the curtailment proposed by S. 2094 include the Federal Judicial Conference,²⁵ Chief Justice Warren Burger²⁶ and Circuit Judge Henry Friendly, who long has been in the forefront of those advocating reform in this area.²⁷ Professor Charles A. Wright²⁸ is among the scholars supporting abolition. Among the arguments urged by those supporting the proposed legislation are the following:

1. The federal courts are being burdened with an ever increasing litigation load. Diversity cases, which in fiscal 1977 comprised approximately 24% of the federal docket (31,678 diversity filings out of 130,567 total civil filings in the federal courts),²⁹ preclude judges from devoting more attention to the flood of federal question cases which have a stronger claim on federal judicial attention. Moreover, those diversity cases which reach trial require a disproportionately larger expenditure of judicial time than do other cases in the federal courts. In 1969-1970, when diversity cases constituted 26.2%

¹⁹ See 28 U.S.C. § 1391(b) (1970).

²⁰ Statement of Frederick A. O. Schwarz, Jr., with regard to S. 2389, in Senate Hearings.

²¹ Statement of Alan B. Morrison, Director, Public Citizen Litigation Group, in Senate Hearings.

²² American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* at 12-13 (1969) (hereinafter "ALI Study").

²³ *Id.* at 3-4 (summary).

²⁴ Professor David Shapiro of the Harvard Law School had also suggested that the district judges within each federal judicial district be authorized, after taking into consideration the benefits and burdens of diversity jurisdiction in the district, including certain enumerated factors, to adopt a local rule which would in effect retain the present system, adopt the ALI proposal or abolish diversity within their own district. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 340 (1977).

²⁵ See letter of Hon. Edward T. Gignoux to Hon. Robert W. Kastenmeier, Nov. 7, 1977, reproduced in House Hearing at 378; see also 66 A.B.A.J. 477 (1977).

²⁶ See *supra* n. 12; see also Burger, *supra* n. 12.

²⁷ See *supra* n. 12.

²⁸ See Statement of Charles A. Wright in House Hearings at 218. Professor Wright delivered a similar statement at the Senate Hearings.

²⁹ Director of the Administrative Office of the United States Courts, *Annual Report A-14*, Table C 2 (1977).

of civil filings, diversity litigation took 37.9% of the district judges' civil case time.³⁰

2. The burden on the state courts of transferring diversity cases to them would be minimal.* The 30,000 or so diversity cases now distributed among 400 federal judges would be spread among 6,000 state judges.³² While the resulting distribution would not be uniform, no state caseload would be increased by more than 1.5% or so if the reforms of S. 2094 were adopted.† The percentage figures are roughly double this for the total abolition of S. 2389. The Conference of Chief Justices of state courts has gone on record as expressing the willingness and ability of the state court systems to handle some or all of the cases currently being adjudicated by the federal courts in diversity matters.³⁴

3. Diversity cases reach the federal courts by an accident of citizenship. They are state cases and therefore decided under law as to which federal trial judges and particularly federal appellate judges can claim no special expertise. Federal judges must defer to existing state law and anticipate state rulings where no precedent exists. This is confusing to the development of the law and viewed as wasteful and intellectually unsatisfactory by some members of the federal judiciary.³⁵

4. Under present federal diversity jurisdiction, a plaintiff has a choice of whether to bring an action, assuming it meets minimum diversity requirements, in state or federal court. This option to bring an action in federal court under diversity jurisdiction, it is claimed, turns on the accident of geography, and under such circumstances serves no purpose.³⁶ Moreover, it permits forum shopping by both plaintiffs and defendants. Supporters of abolition urge that the practicing plaintiffs' bar often perceives the federal forum as being the source of higher verdicts and the defendants' bar sometimes uses, by removal to federal court, the choice of forum to delay the resolution of litigation.³⁷

³⁰ Federal Judicial Center, *The 1969-70 Federal District Court Time Study* 66G, Table XVII (1971).

*In 1970 an extensive analysis was made of the American Law Institute proposal the essential feature of which was to eliminate the right of plaintiffs to sue under diversity jurisdiction in their home state. The analysis showed that in fiscal 1970, 81,107 civil cases were filed in the federal courts. Of the 22,854 diversity cases (28.2% of the total civil cases) filed in 1970, 19,510 were originally filed in federal court and 3,344 were removed from state courts. Under the ALI proposal at least 10,061 of these diversity cases (12.4% of all civil cases in federal courts) would have been excluded from the jurisdiction of the federal courts, while an additional 4,048 cases (5.0% of all civil cases in federal courts) would have remained in state courts unless removed to federal courts. Thus the maximum number of civil cases which would have been litigated in state courts rather than federal courts would have been 14,109 diversity cases (17.4% of the federal civil caseload). In the state of New York during fiscal 1970, 8,599 civil cases were commenced in federal courts; the total number of diversity cases was 1,947 (22.6%); and the maximum number of cases which would have been shifted was 1,132 (13.2%).³¹

³¹ Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Effect on State and Federal Courts*, 48 N.D.L. Rev. 1, 10-12 (1971).

³² Statement of Hon. Robert W. Kastenmeier, 124 Cong. Rec. H. 1555 (daily ed. Feb. 28, 1978).

† This figure is based on the analysis of the ALI proposal, *supra* n. 31. As previously noted, the ALI proposal would likely be similar in impact to, though substantially different in detail from, S. 2094. Among the states included in the analysis of the ALI proposal New York ranked at the highest end of the scale in terms of the impact of the transfer of cases to its state courts. In the courts of general jurisdiction of the State of New York, 75,809 civil cases were commenced in 1970. The 1,132 cases in the federal courts which would have been shifted under the ALI proposal were 1.5% of the state civil cases. At the lowest end of the scale was Maryland where the 193 diversity cases which would have been shifted equally 0.27% of the total 53,667 cases commenced in the courts of that state.³³

³³ Burdick, *supra* n. 31, at 14-15.

³⁴ "Our state court systems are able and willing to provide needed relief to the federal court system in such areas as . . . the assumption of all or part of diversity jurisdiction presently exercised by the federal courts." Resolution of Conference of Chief Justices, August 3, 1977, reproduced in part in letter from Hon. Robert J. Sheran to Hon. Robert W. Kastenmeier in House Hearings at 268. This letter also included federal question cases as an area where the state judges were willing and able to provide needed relief.

³⁵ See, e.g., Friendly, *supra* n. 12, at 142-44; cf. ALI Study, *supra* n. 22, at 99. There exists a related, though distinct argument, that state judicial and legislative authority should be coextensive and that diversity jurisdiction constitutes an unwarranted infringement. See ALI Study at 99. This theoretical argument has been given considerably less emphasis in the debate over the current legislation than in earlier debates. Another view which has sometimes been advanced to support abolition is that state court reform is retarded so long as attorneys feel that they can have recourse to the federal courts. See Wright and Miller, *supra* n. 12, § 3601.

³⁶ See, e.g., ALI Study, *supra* n. 22, at 2.

³⁷ This view is discussed in Wright & Miller, *supra* n. 12, § 3601 at 594, 596. See also the discussion in the Statement of Hon. Robert W. Kastenmeier in the Senate Hearings.

5. Both supporters of total abolition and those who support the concept of S. 2094 agree that there is no significant justification for allowing a plaintiff to sue under diversity in the federal court of his own state.³⁸ Such plaintiff experiences no out-of-state prejudice and cannot be heard to complain of any disparity in the quality of justice between state and federal courts since he, like all citizens of the state, bears responsibility for its institutions.³⁹ In this regard, it has been argued that federal law already, under the removal statute, recognizes that there is no need for federal jurisdiction to be exercised at the behest of an in-state party since removal to a federal court is now precluded for a defendant sued in his home state court. This disparity between the removal statute and the diversity statute which permits a plaintiff in a diversity case to sue in his home state is argued to be unjustifiable inconsistency. The growing practice of many federal courts to select jurors from the same pools as the state courts also casts doubt on the continuing significance of an out-of-state prejudice rationale for diversity jurisdiction.⁴⁰ If sectional prejudice does exist and if jurors are taken from identical pools, then the only moderating force in a diversity case would be the federal judge.

6. Adherents of total abolition also assert that there is no longer reason to believe that significant prejudice exists against out-of-state litigants sufficient to justify diversity jurisdiction.⁴¹ A limited empirical study is cited in support of this proposition.⁴²

Those who oppose abolition or reduction of diversity jurisdiction including Professor J. William Moore⁴³ and most of the bar associations⁴⁴ which have, as of this date, considered the matter, have argued:

1. Diversity jurisdiction has worked well, providing an effective means of redress for the litigants involved, whose interests are, after all, paramount. Diversity jurisdiction also has fostered a sense of national unity and cohesion. While it may be conjectured that prejudice against out-of-staters has diminished over the years, an empirical study has suggested that such prejudice—or the fear of it—remains.⁴⁵ This problem is of particular concern in the differing treatment of large in-state employers and out-of-state corporations. It is the burden of those who would change a working system to demonstrate the necessity for change.⁴⁶

³⁸ The Department of Justice, original sponsor of the limited S. 2094 proposal, ALI, which sparked reform in this area with its 1969 study, Professor Wright, Judge Friendly and others share this view.

³⁹ ALI Study, *supra* n. 22, at 2.

⁴⁰ Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 54 (codified at 28 U.S.C. §§ 1861-1863 (1970 & Supp. V 1975)).

⁴¹ This position is advanced by Professor Wright and Judge Friendly; many others share this view. See House Hearings at 220 and the views of Judge Friendly, *supra* n. 12, at 147-48. The continued existence of prejudice related to "race, religion, wealth, sex, length of hair" and other factors is recognized by Professor Wright, but he states, "it is doubtful in the extreme that prejudice against a person because he is from another state is any longer a significant factor." House Hearings at 220.

⁴² Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 Iowa L. Rev. 933 (1962). In this survey of Wisconsin lawyers who had filed diversity cases or removed such cases to the federal courts, only seven identified "local bias against non-resident client" as a basis for their decision. Other observers have concluded that "fears of possible prejudice may not have been as infrequent as this ratio indicates," in part because such prejudice may have been subsumed in other ambiguous categories. Shapiro, *supra* n. 24, at 331-32. Professor Shapiro, himself a proponent of some reform in diversity, concludes, in rejecting the conclusions of this survey: "In short, the author seems to have been out to prove a point." *Id.* at 332.

⁴³ See Moore and Weckstein, *supra* n. 4; Statement of J. William Moore in Senate Hearings; see also Wright, *The Federal Courts and Nature and Quality of State Law*, 13 Wayne St. L. Rev. 317 (1967).

⁴⁴ The Missouri Bar Association and the Association of Trial Lawyers of America have submitted statements to the Senate opposing change. The Section on Litigation of the American Bar Association has recommended a similar position to the ABA as a whole. The ABA has refused to support the proposed legislation, but the vote by the Board of Governors as to active opposition has been deferred to June 10, 1978. As of April 26, 1978, according to the ABA *Washington Letter* (May 1, 1978), nine state bars oppose all the proposed legislation. Five other state bars oppose any bill providing for total abolition of diversity jurisdiction and one state bar supports the limited approach of S. 2094. The American College of Trial Lawyers supports the reduction of diversity jurisdiction provided for under S. 2094. See statement of Erwin N. Griswold in Senate Hearings.

⁴⁵ As to the overall assessment of the system, see Moore and Weckstein, *supra* n. 4. A survey of Virginia attorneys showed that 60.3% of those responding cited potential prejudice as a factor leading to the choice of a federal court for an out-of-state plaintiff. Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 Va. L. Rev. 178, 179 (1965). This study, like that of Wisconsin attorneys which led to a contrary conclusion, has been the subject of criticism. See Shapiro, *supra* n. 24, at 331.

⁴⁶ See Moore and Weckstein, *supra* n. 4, at 25.

2. The burden of diversity cases on the federal courts is an insufficient basis for change. Someone must decide these cases: the net effect of the abolition of diversity may be further to delay resolution of cases in the large metropolitan centers of the country where, it is contended, far greater delay awaits a litigant in state court than the federal litigant.⁴⁷ The growth rate of litigation in state courts equals or slightly exceeds the rate of growth in federal litigation in a number of metropolitan areas.⁴⁸ According to one study, conducted for 1970-71 by an opponent of abolition, a typical litigant must wait sixteen months longer in state court to have his case disposed of than in federal court.⁴⁹ Set forth below are the waiting times (expressed in months) obtained in a limited update of that study.⁵⁰

City:	State	Federal
Chicago -----	37	11
Brooklyn -----	35	18
Manhattan -----	46	21
Boston -----	47	34
Philadelphia -----	47	27

Furthermore, it is urged that by affording litigants a choice of forums, diversity jurisdiction has served to moderate the delays in both state and federal courts; the tendency of plaintiffs to file in courts with the lesser waiting time for trial reduces the differences in congestion between the two court systems.⁵¹ If federal diversity jurisdiction were eliminated, a diversity plaintiff would have no option when state courts are badly congested. The result would be further delays in the administration of justice. The authorization of additional federal judgeships, an increasing role for magistrates and exploration of the feasibility of removing some disputes from litigation altogether may be more profitable avenues to explore in eliminating congestion on the federal docket.

3. The federal courts, by virtue of their national organization, provide procedural advantages in cases involving parties from different states which are not available in state courts: e.g., the ability to consolidate multidistrict litigation in a single district for pretrial purposes; the ability to transfer a case to a more convenient forum; the "100-mile bulge" rule, which enables federal courts to obtain jurisdiction over out-of-state parties; the 100-mile bulge rule for serving subpoenas on witnesses; the availability of pretrial discovery in districts in other states; and the ability to register a federal court judgment in any other federal court.⁵² The uniformity of procedures in federal courts has allowed individuals and entities engaged in commerce

⁴⁷ See Frank, *House Hearings* at 234-35; statement of Professor Moore in Senate Hearings, at 14-15.

⁴⁸ Minnesota Chief Justice Robert J. Sheran, in testifying before the Senate in support of the diversity abolition, stated that the annual caseload growth rate in state cases in such industrial states as Ohio and Michigan is between 7% and 8%, equalling or exceeding the federal annual average of 7%. In states such as Minnesota, Kansas and Iowa, the annual state growth rate is considerably lower—in the range of 3% to 4%. Statement of Hon. Robert J. Sheran, Chief Justice of the Supreme Court of Minnesota, in Senate Hearings at 6 (March 20, 1978).

⁴⁹ Frank, *Let's Keep Diversity Jurisdiction*, 9 Forum 157, 161-62 (1973). Comparable 1970-71 waiting time data (expressed in months) was as follows:

City:	State	Federal
Chicago -----	61.7	14
Brooklyn -----	51.9	16
Manhattan -----	49.9	27
Boston -----	35.0	15
Philadelphia -----	46.8	37

⁵⁰ The sample for both the study and the update are, as Mr. Frank himself recognizes, less than complete and the comparison is in some respects less than ideal, comparing, as it does, 1974 state personal injury statistics with all federal jury trials for fiscal 1976—in each case the latest data available according to Mr. Frank. He acknowledges these limitations, but neither he nor anyone else on either side of the debate has, so far as we are aware, offered figures which could provide a more precise assessment of relative waiting time. See *House Hearings* at 234-35.

⁵¹ See Frank, *supra* nn. 49-50.

⁵² See: 28 U.S.C. § 1407 (1970), as amended, Act of Sept. 20, 1976, Pub. L. No. 94-435, 90 Stat. 1396 (consolidation of multi-district litigation); 28 U.S.C. § 1404(a) (1970) (availability of transfer for convenience of parties or witnesses); Fed. R. Civ. P. 4(f) (100-mile bulge for jurisdiction over out-of-state parties); Fed. R. Civ. P. 45(e)(1) (100-mile bulge for serving subpoenas on witnesses); Fed. R. Civ. P. 45(d) (ready access to out-of-state discovery); 28 U.S.C. § 1963 (1970) (ability to register federal court judgment in other federal courts). Professor Shapiro views these procedural advantages as of primary consequence in evaluating diversity jurisdiction. Shapiro, *supra* n.24, at 328.

throughout the country to plan and control their litigation in a fashion which would be impossible in the absence of diversity jurisdiction. Broad discovery and the frequently more liberal acceptance of out-of-state counsel in the federal courts also are seen as advantageous.

4. The *Erie* requirement that federal courts apply state substantive law in diversity cases has resulted in a continuous flow between the federal and state systems of both procedural and substantive reforms. This process of cross-fertilization has been evident in the widespread emulation in the states of the federal rules of civil procedure and the federal courts' adoption of the experiences of the states in areas such as the rules of evidence. Elimination of such cross-fertilization could have significant adverse effects on the general character and competence of the two systems.⁵³ Under the present system, this cross-fertilization also promotes the development of state substantive law. In a recent study, a review of five volumes of the *Federal Reporter, Second Series* (531 F.2d-535 F.2d), revealed 90 diversity cases of which 21 made arguably useful contributions to developing state law by reconciling or distinguishing existing precedent, synthesizing and analyzing state law or setting statutory or constitutional boundaries to the reach of state long-arm statutes.⁵⁴

5. With the elimination of diversity, it has been argued, it is likely that the federal and state bars would be further isolated from each other. Lawyers spending most of their time in federal courts would be a distinct breed, trained in the distinct specialties of federal statutory law, and federal judges would most likely be chosen from that group.⁵⁵ These judges would not have had exposure to state procedure, nor to the broader range of state common law questions.⁵⁶

6. With varying degrees of explicitness, adherents of the retention of diversity have pointed to what is viewed as the generally superior caliber of the federal bench as compared to that of the states. It is urged that questionable theories of federalism should not deprive litigants of an opportunity to have their case decided in the forum in which parties have greater confidence. That this opportunity is available to but some litigants is not thought decisive by those advancing this view.⁵⁷

V. ANALYSIS OF THE ARGUMENTS FOR AND AGAINST THE LEGISLATION

In our view the abolition of diversity jurisdiction is uncalled for. We base this view in part upon the belief that the existing system has served the nation well and that convincing proof of the need for change alone should justify such change. This proof is largely lacking. The mere theoretical concern that diversity cases are state cases and belong in state courts seems to be insufficient—at least after nearly 200 years of contrary practice without untoward results. The fear of sectional bias which many believe explains the origin of diversity jurisdiction has not been shown to be illusory today. Indeed, the ALI study which sparked much of the effort for reform in this area over the last decade recognized this and refused to endorse wholesale abolition of diversity jurisdiction.⁵⁸ The few

⁵³ This point is made by Professor Moore, Mr. Frank, and various bar groups. The extent of the interchange is reflected in the following Federal Rules of Civil Procedure: See Advisory Committee Notes, 28 U.S.C. at 7734 (Rule 2); *id.* at 7742 (Rule 7); *id.* at 7752 (Rule 14); *id.* at 7754 (Rule 15 (a)); *id.* at 7756 (Rule 16); *id.* at 7757 (Rule 18); *id.* at 7761 (Rule 20); *id.* at 7775 and 7776 (Rule 26); *id.* (1946 Amendment to Rule 26); *id.* at 7783 (Rule 27); *id.* at 7793 (Rule 34); *id.* at 7795 (Rule 35); *id.* 7802 (Rule 38); *id.* (Rule 39); *id.* at 7805 (Rule 42); *id.* at 7811 (Rule 46); *id.* (Rule 47 (b)); *id.* at 7815 (Rule 52); *id.* 7821 (Rule 55 (a)); *id.* (Rule 55 (b)); *id.* at 7822 (Rule 56); *id.* at 7823 (Rule 57); *id.* at 7824 (Rule 58); *id.* at 7825 (Rule 59); *id.* at 7826 (Rule 60 (b)); *id.* at 7833 (Rule 68); see generally Clark, *Two Decades of the Federal Civil Rules*, 58 Colum. L. Rev. 435 (1968). "Similar reforms in the evidence area now flow back and forth, first in taking state reforms into the making of the Federal Rules of Evidence, and now in States taking up the approach of the codification in whole or in part." Statement by David Berger, Esq., Chairman Judicial Admin. Comm., Int'l Academy of Trial Lawyers in Senate Hearings.

⁵⁴ Shapiro, *supra* n. 24, at 325-26.

⁵⁵ Diversity Jurisdiction Hearings on S. 1876 before the Subcomm. on Improvements in Judiciary Machinery of the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess. at 262, 277-78 (1971) (testimony of John Frank); see also Shapiro, *supra* n. 24, at 325 n. 44.

⁵⁶ Shapiro, *supra* n. 24, at 325 n. 44.

⁵⁷ See Shapiro, *supra* n. 24, at 325; Frank, *supra* n. 47, at 233; Moore and Weckstein, *supra* n. 4 (statement at 11); Wright, *supra* n. 43, at 327 et seq. Interestingly, Chief Justice Sheran of Minnesota, although an adherent of the abolition position, recognized that at least in such areas as civil rights cases, the insulation provided federal judges by lifetime appointments gives them an advantage over state judges in withstanding the tug of local prejudice. See Statement of Hon. Robert J. Sheran at Senate Hearings.

⁵⁸ ALI Study, *supra* n. 22, at 106-07.

empirical studies which have been conducted reflect mixed results and are based on such limited samplings as to be unpersuasive in either direction even if their results were not in direct conflict with each other.⁵⁹

The need to clear the federal docket to free the federal judiciary for other matters is potentially a more significant justification for abolition of diversity jurisdiction. In our judgment, several factors militate against this argument, however. The cases currently being tried as diversity matters in federal court must be tried somewhere; the federal system seems far more likely to have the resources to cope with an expanding docket than the state systems.* Certainly it makes little sense to transfer cases to state courts already more overcrowded in many metropolitan areas than the federal courts.⁶¹ The anticipated addition of a large number of federal judges and new emphasis on the use of federal magistrates may improve the federal docket situation significantly;⁶² the impact of such changes, of course, has not yet been felt. Attention also might be given to broadening arbitration remedies in certain federal question cases, for example.

Additionally, we believe the existing diversity jurisdiction serves a number of beneficial functions unrelated to protection of litigants against prejudice; we believe the loss of these benefits would be highly undesirable. The cross-fertilization between the federal and state systems which now exists in large part as a consequence of federal diversity jurisdiction is likely to be eliminated if diversity jurisdiction is abolished, and the effect on the judiciary as well as on the entire legal system is likely to be substantial and adverse. Should this interaction be eliminated, the state systems would be forced to operate in isolation, without recourse to the federal safety valve.

The ability of a national system of courts with special procedures to deal effectively with cases involving parties from many states also would be largely lost (except for interpleader and alienage cases) if diversity jurisdiction were abolished. The loss of opportunity to consolidate multi-state, multi-party cases for pre-trial purposes, of recourse to transfer rather than dismissal in *forum non conveniens* situations, and of liberal discovery procedures in some cases would seriously hamper efficient multi-state litigation. These are important facts in forming our conclusion that abolition would be inappropriate.

Diversity jurisdiction serves other goals unthought of by the draftsmen of the Constitution. It provides a convenient form for mass accident cases which require courts with national powers. It provides an opportunity for federal court input in areas of law—such as defamation and privacy—which have become increasingly “constitutionalized” in terms of federal constitutional defenses. Absent diversity jurisdiction only the United States Supreme Court, among the federal courts, would be able to contribute to the development of such law. It certainly is true that each of these unintended roles for diversity jurisdiction could be handled by specific legislation aimed at the problem in question (and indeed the original ALI proposal coupled its call for reduction in diversity jurisdiction with the extension of federal question jurisdiction to federal or constitutional matters raised defensively and an elimination of the requirement of complete diversity in a variety of situations). But it is questionable whether a series of special extensions of jurisdiction coupled with an otherwise complete abolition of diversity is workable or whether, in the end, the sum of the new parts would equal the benefits provided by the present whole.

We believe that many of these same factors militate against adoption of S. 2094. While there can be little doubt that the fear of prejudice against out-of-staters which may have lain behind the original grant of diversity jurisdiction is of no consequence as to a plaintiff suing in his home state, it is also true that other benefits of diversity jurisdiction exist and, in our view, these benefits out-

⁵⁹ See discussion of these studies in Shapiro, *supra* n. 24, at 331–32.

*The federal court system obviously has a great reserve of resources to draw upon. In fiscal 1977, for example, appropriations for the federal court system accounted for less than 1/10 of 1% of the overall federal expenditures.⁶⁰

⁶⁰ As to appropriations for the federal courts, see 1977 *Annual Report of the Director*, *supra* n. 29, at 45. 1977 budget figures are taken from U.S. Dep’t of Commerce, *Survey of Current Business* at 14 (April 1978).

⁶¹ See *supra* nn. 49–50. The ALI Study itself has recognized the fact that, in large metropolitan areas, the federal courts have resolved problems of overcrowding better than the state courts. ALI study, *supra* n. 22, at 108.

⁶² See discussion of H.R. 7843, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, United States House of Representatives, 95th Cong., 1st Sess. (1977). H.R. 7843 and S. 11, which provide for a substantial increase in the number of Federal District Court and Court of Appeals Judges, have been passed by the respective houses of Congress.

weight a theoretical anomaly which has been accepted for generations. Certainly, the principal practical motivation for change—the easing of the burden on the federal judiciary—is somewhat less persuasive in this context since fewer cases (between 50% and 80% of all diversity cases)⁶³ would be eliminated from the federal docket by S. 2094 than under S. 2389. Even this switch, however, could have a significant impact on already overburdened state trial courts in many metropolitan areas. The legislation would engender some measure of confusion, while potentially depriving many litigants of the benefits of a national court system well adapted to handle modern disputes stretching across state boundaries.

VI. COMMENTS WITH RESPECT TO SPECIFIC PROVISIONS OF PENDING LEGISLATION

While both proposed pieces of legislation raise broad questions with respect to federalism and judicial administration, narrower questions as to the mechanics of the legislation also are posed. We deal with these below in an effort to provide a complete assessment of the proposed legislation. The remedying of the narrow objections we note would not alter our basic opposition to the legislation itself.

S. 2389, providing for total abolition of diversity jurisdiction, is also noteworthy in eliminating the \$10,000 jurisdictional requirement with respect to federal question cases. We think this is a useful change, removing a bar to types of cases which properly should be heard in the federal courts without regard to the amount in controversy.

In abolishing jurisdiction over diversity cases, the bill requires a change in the existing venue laws as well. S. 2389 opts simply to apply the general outlines of existing diversity venue to federal question venue. This would have the effect of adding as bases of venue the district of plaintiff's residence and the location of aspects of the cause of action. In view of such an expansion of existing venue for federal question cases, it would seem that some explanation in the legislative history would be appropriate.

The bill also deletes reference to the phrase "in which the claim arose" as a basis for venue, substituting "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." This later phrase is already in 28 U.S.C. § 1391(f) so that the change eliminates the use of differing phrases within the venue statute itself. It may be overly sanguine to assume that this change will eliminate problems with respect to the issue of appropriate locations for venue, however. The proposed phrase may be broader than the long-arm jurisdiction concept of "where the claim arose" and confusion between the standards—often considered in the same cases—may be expected.⁶⁴

The bill also would allow—for the first time—removal of a suit by a resident defendant sued by an alien in state court. This results from the proposed repeal, apparently as superfluous, of present 28 U.S.C. § 1441(b), which precludes removal by resident defendants in all diversity cases. Consistent with the logic behind the proposed abolition of diversity, it would seem that § 1441(b) should be retained to cover the small class of cases involving alien plaintiffs and resident defendants.

S. 2389 increases the jurisdictional amount to \$25,000 for so-called alienage cases. While possibly making a small cut in the number of such cases, the amendment seems to run contrary to the rationale offered for retention of such jurisdiction, namely, that a national court should be available where foreign states, citizens or subjects are parties. Logically, such consideration applies without regard to the amount in controversy. If such jurisdiction is appropriate for legitimate policy reason, it should be retained without crabbéd dollar limits which the same legislation elsewhere eliminates entirely for other classes of cases (i.e., federal question jurisdiction).

S. 2389 provides that its provisions shall apply to "any civil action commenced on or after the date of enactment of this Act." S. 2094 is phrased in terms of

⁶³ Compare the estimate of Mr. Frank (House Hearings at 235) with that of Professor Wright (*Id.* at 223). As to the difficulties of assessing the impact on the federal courts of bills eliminating a plaintiff's right to sue in his own state, see Letter of R. F. Keller, Deputy Comptroller General of the United States, to Hon. Peter W. Rodino, Jr., reproduced in House Hearings at 283, 290.

⁶⁴ As to the already existing confusion, see 15 Wright and Miller, *supra* n. 12, § 3806.

"actions commenced after the date of enactment of this Act." Both leave open areas of potential ambiguity as to applicability, particularly as to state civil suits, however denominated, which would have been eligible for removal under the standards applicable to diversity removal prior to the enactment of the proposed amendments, but which would not be eligible under the new amendments and which had not been removed at the time of enactment. The problem could be remedied relatively simply in either a clearly inclusive or exclusive manner.

S. 2094 would, by leaving intact the basic provisions of 28 U.S.C. § 1441, allow a defendant to remove a case to federal court which an in-state plaintiff could not himself have commenced there. This seems consistent with the notion, pivotal to S. 2094, that only out-of-state parties should be allowed to invoke diversity jurisdiction; it may, however, have the unintended effect of encouraging collusion by parties where both are eager to obtain a federal forum, leading parties to agree that a non-resident defendant will remove the case from state to federal court to accomplish a choice of forum plaintiff could not have made. This problem may be inherent in the halfway measure of S. 2094, although an affidavit of non-collusion or the like might be required if the problem were considered to be serious enough.

Finally, one of the substantial practical problems with the halfway measure of S. 2094, as drafted, is that it limits proper venue to the district where all defendants reside or where the claim arose. In the multi-party cases there may be no district where all defendants reside and the remaining basis for venue may prove impracticable for a variety of reasons. The effect of this limited venue requirement thus could well be to deprive the very plaintiff who most requires the various procedural benefits of a national court system of a realistic opportunity to avail himself of such benefits. An extension of the venue provisions to any district in which one or more defendants resides and a change in the location basis to that now in 28 U.S.C. § 1391(f) and proposed in S. 2389 thus might be desirable if the features of S. 2094 are to be implemented.

CONCLUSION

For the reasons stated, we believe that substantial alteration of diversity jurisdiction is unwarranted, and accordingly, we oppose H.R. 9622, in Senate counterpart, S. 2389, and S. 2094.

June 7, 1978.

Respectfully submitted,

COMMITTEE ON FEDERAL LEGISLATION,
 JOHN D. FEERICK, *Chairman*.
 MARK A. BELNICK
 JAMES N. BENEDICT
 HARVEY E. BENJAMIN
 BARRY A. BERGER
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 ROBERT C. SHEEHAN
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(f)

UNIVERSITY OF CALIFORNIA, BERKELEY,
SCHOOL OF LAW (BOALT HALL),
Berkeley, Calif., May 1, 1979.

Representative ROBERT W. KASTENMEIER.

Chairman, Subcommittee on Courts, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I write in connection with the pending proposals for revision of federal court jurisdiction, and particularly with regard to the diversity-of-citizenship aspect of that jurisdiction.

I strongly support the abolition of general diversity jurisdiction. I also agree with the retention of statutory interpleader based on diversity. In statutory interpleader, the federal courts, with authority for nationwide service or process, fulfill a function which is made necessary by the federal nature of our union and which state courts cannot be relied upon to serve.

The same reasoning which supports statutory interpleader also supports the creation of a limited new head of diversity jurisdiction, for situations where all parties whose presence is necessary to achieve just adjudication of a case are so dispersed that they cannot be gathered into a single state court action. In those circumstances, as in interpleader, the federal courts may uniquely serve to meet a problem created by the federal nature of our union.

The American Law Institute recommended the creation of such a head of jurisdiction in its Study of the Division of Jurisdiction Between State and Federal Courts. I enclose a copy of the Institute's proposed statutory text, together with the introductory general section of the commentary. (Your staff should have no difficulty obtaining the remainder of the commentary, but if it is a problem, I would be glad to supply it too.) I would urge that you consider a proposal along these lines for adoption in conjunction with the abolition of general diversity jurisdiction.

This proposal does not meet a frequently recurring problem. It is, rather, that when a problem of this kind does arise, it is serious, and there is simply no other solution by which the litigation can be conducted efficiently and the entire dispute resolved without either costly duplication or less than full justice.

This specific proposal has not attracted much attention heretofore. I believe this is due in part to the fact that it is not a frequently recurring problem and thus hits lawyers only sporadically and somewhat at random. I think it is also due to the fact that the proposal appears on its face to be complex. That complexity is, however, a matter of appearance. In fact, the detailed style of drafting is a result of seeking to anticipate issues which might otherwise be the subject of protracted litigation, and to resolve them in advance by legislation. The result in practice should be to simplify the jurisdiction by eliminating much threshold litigation.

As you will see, the proposal does not open a large new pathway for diversity litigation. It does not create an incentive to add parties in order to get access to a federal court. It provides limited access to the federal courts in those relatively few cases where no state court can provide full justice. Again, it meets not a frequent problem, but one that is serious when it arises.

(In the interests of full disclosure, I should say that I was Reporter for the American Law Institute Study and involved in the drafting of the enclosed proposal. I should add, however, that I continue independently to believe that adoption of this provision would be wise.)

Needless to say, if I can be of help on this or any other matter, I hope you will let me know.

Sincerely,

PAUL J. MISHKIN.
Heller Professor of Law.

Enclosures.

MULTI-PARTY MULTI-STATE DIVERSITY: JURISDICTION, VENUE, PROCESS

(8) Adding a new chapter 160 as follows:

CHAPTER 160—NECESSARY PARTIES DISPERSED IN DIFFERENT JURISDICTIONS

Section

2371. Dispersed necessary parties; original diversity of citizenship jurisdiction.

2372. Venue in original actions under dispersed parties diversity of citizenship jurisdiction.

- 2373. Dispersed parties diversity of citizenship jurisdiction; removal of actions brought in State courts.
- 2374. Process and procedure in actions under dispersed parties diversity of citizenship jurisdiction.
- 2375. Definitions in actions under dispersed parties and interpleader diversity of citizenship jurisdiction.
- 2376. Dispersed necessary parties in actions in district court under other jurisdictional statutes.

§ 2371. *Dispersed necessary parties; original diversity of citizenship jurisdiction*

(a) The district courts shall have original jurisdiction of any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amendable to process of any one territorial jurisdiction, and one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

(b) A defendant is necessary for a just adjudication of the plaintiff's claim, within the meaning of this chapter, if complete relief cannot be accorded the plaintiff in his absence, or if it appears that, under federal law or relevant State law, an action on the claim would have to be dismissed if he could not be joined as a party. Persons against whom several liability is asserted shall not be deemed necessary for a just adjudication of the plaintiff's claim because liability is asserted against them jointly or alternatively as well.

(c) A person is amendable to process of a territorial jurisdiction, for the purposes of this section, if, and only if, that person—

(1) being an individual, has his domicile or an established residence or his principal place of employment or business activity in that jurisdiction; or

(2) being a corporation or other entity sued as such, is incorporated or has its principal office in that jurisdiction; or

(3) has an agent in that jurisdiction authorized by appointment to receive service of process; or

(4) may, under the laws of that jurisdiction, be subjected to a fully effective judgment of its courts without delivery of process within the territorial jurisdiction to such person or the agent of such person authorized by appointment to receive it.

Note

Subsection (a) provides original jurisdiction whenever necessary defendants are so dispersed as to be beyond the reach of any other single judicial forum, and there is some diversity of citizenship among parties.

Subsection (b) defines when defendants are thus necessary to a plaintiff's action, expressly including those without whom he could not maintain the action in another forum (so-called "indispensable" parties) and excluding joint tortfeasors or others against whom joint-and-several or alternative liability is asserted.

Subsection (c), to reduce threshold litigation, provides that the determination of whether necessary defendants are within the reach of process of a jurisdiction shall be made, not by a factual inquiry as to whether each might with diligence have been found there, but solely by reference to stated objective factors.

Definitions of particular terms used in this section are provided in § 2375 infra.

For detailed commentary, see pp. 386-392 infra.

§ 2372. *Venue in original actions under dispersed parties diversity of citizenship jurisdiction*

(a) A civil action wherein jurisdiction is founded solely on section 2371 of this title may be brought only in a district where a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of property that is the subject of the action is situated, except that if there is no such district within the United States, the action may be brought in any district where any party resides.

(b) For purposes of this section, a corporation shall be regarded as a resident of the district where it has its principal place of business and also of each district in every State by which it has been incorporated if its principal place of business is not in that State, and a partnership or other unincorporated association shall be regarded as a resident of the district where it has its principal place of business.

Note

Commencement venue of original actions under § 2371 is limited by this section to those federal districts having substantial contacts with the subject of the action. Except where there is no such district (because all relevant events and property are outside the United States), venue is not authorized in terms of parties' residence. Since federal process can summon parties in these actions from wherever they may be (§ 2374 *infra*), general availability of residence venue is not called for. Liberal transfer of venue is authorized by § 2374(b) *infra*.

For detailed commentary, see pp. 392-393 *infra*.

§ 2373. *Dispersed parties diversity of citizenship jurisdiction; removal of actions brought in State courts*

(a) A civil action commenced in a State court in which one or more additional parties necessary for a just adjudication as to a defendant cannot be joined or with the exercise of reasonable diligence served with process or otherwise made subject to a fully effective judgment of the courts of that State, may be removed by any adversely affected defendant to the district court for the district embracing the place where such action is pending if one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

In actions wherein jurisdiction is founded on this section, the word "parties" as used in this chapter includes all persons named in the petition for removal as necessary for a just adjudication as to the defendant, whether or not such persons were named or joined as parties in the action in the State court.

(b) A person is necessary for a just adjudication as to a defendant, within the meaning of this chapter, if he claims or may claim an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action in his absence may leave the defendant subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. A person is not thus necessary for a just adjudication simply because he is or may be liable to a defendant for all or part of the plaintiff's claim against the defendant.

(c) A counterclaim asserted in a State court arising out of the same transaction or occurrence as the plaintiff's claim shall be deemed an action for purposes of this section, and if the requirements hereof are met, the entire State court action may be removed. For the purpose of determining whether absent persons are necessary for a just adjudication of such a counterclaim, a plaintiff in the State court shall be considered as a defendant under subsection (b) of this section, and a defendant therein as a plaintiff under subsection (b) of section 2371 of this title; for all other purposes of removing such action, including the procedural steps therefor, original plaintiffs or defendants may be deemed defendants.

A counterclaim asserted in a State court that does not arise out of the same transaction or occurrence as the plaintiff's claim shall be deemed an action for the purposes of this section and may be removed by a plaintiff in the State court action if as a defendant he would have been able to remove under subsections (a) and (b) of this section.

(d) A petition for removal under this section shall contain a statement that every reasonable effort has been made by or on behalf of the removing party to have each absent person who is necessary for a just adjudication as to him made a party and served with process or otherwise made subject to a fully effective judgment in the State court.

(e) In an action where jurisdiction is founded solely on this section, if there is a State court in which an action on the claim may be maintained and to whose process all parties necessary for a just adjudication are answerable or agree to submit, the district court on motion of any party or on its own motion may stay proceedings before it pending prosecution of an action on the claim in the courts of that State. In determining whether to stay proceedings for this purpose, the district court shall take into account, in addition to the convenience of parties and witnesses, whether the rules for decision of the action or any substantial part thereof are the laws of the State in whose courts the action would be prosecuted during pendency of the stay and the reasons why the action was not commenced in that State court originally. The decision of a district court staying proceedings or refusing to dissolve a stay under this subsection shall not be reviewable on appeal or otherwise except as provided in section 1292(c) of this title.

Note

Subsection (a) provides jurisdiction on removal whenever a defendant sued in a state court is unable to bring in additional persons whose presence is necessary to assure a just adjudication as to that defendant, provided that there is some diversity of citizenship among parties. Under the circumstances, the criterion on removal (unlike original jurisdiction) is whether those needed persons can be brought into the state court where the original action is pending.

Subsection (b) defines which persons are thus necessary for a just adjudication; that term does not include one who is or may be liable to the defendant for all or part of the plaintiff's claim against him.

Subsection (c) authorizes removal when a counterclaim is asserted in a state court and additional persons necessary for a just adjudication thereof cannot be brought into that state court.

Subsection (d), to assure against abuse of the jurisdiction, requires one removing under this section to certify expressly that all reasonable efforts have first been made to bring the additional necessary parties into the state court proceedings.

Subsection (e), for similar reasons, provides that where another state court is available to entertain the full action and is the forum where it ought to be litigated, the district court may stay its proceedings in favor of an action in that state court. Such a stay order would not be reviewable except under the provisions of § 1292(c) supra.

For detailed commentary, see pp. 394-400 infra.

§ 2374. *Process and procedure in actions under dispersed parties diversity of citizenship jurisdiction*

In any action within this chapter—

(a) The district court shall, except as otherwise provided in this section, on motion issue its process for all parties necessary for a just adjudication and shall have power to restrain them until further order of the court from instituting or prosecuting any proceeding in any State or United States court relating to the property or transaction that is the subject of the action. Such process may run anywhere within the territorial limits of the United States and anywhere outside those territorial limits that process of the United States may reach, and shall be returnable at such time as the court directs.

(b) For the convenience of parties and witnesses or otherwise in the interest of justice, a district court may, on motion of any party or on its own motion, transfer the action to any other district. The exercise of discretion by the district court on such a motion is not reviewable on appeal or otherwise. If the action is transferred at the same time that process is issued under this section, such process shall be made returnable in the district court for the district to which the action is transferred.

(c) Whenever State law supplies the rule of decision on an issue, the district court may make its own determination as to which State rule of decision is applicable.

(d) If one or more absent parties cannot be effectively served with process issuing under this section, the district court shall order that the action proceed without such parties unless it is satisfied that greater injustice would be caused by proceeding without them than by total failure of the action.

(e) If the application of this section would lead to undue burden on distant parties, and the adverse effect of such disposition does not exceed the sum or value of \$5,000 for any party, the district court may in its discretion:

(1) Dismiss without prejudice as to any party or parties upon whom process has been or would have to be served outside the State where the action is to be litigated, and order that the action proceed without such parties; or

(2) If it is satisfied that, in view of the small amounts involved, greater injustice would be caused by any continuation of the proceedings than by total failure of the action, dismiss the entire action without prejudice.

(f) An order that the action proceed without one or more parties necessary for a just adjudication may be conditioned upon the taking of appropriate measures, including the shaping of relief or other provisions in the judgment, for the protection of interests that may be affected thereby. Such an order may be entered under subsection (d) or (e) of this section even though under federal law or any relevant State law an action on the claim could not otherwise be maintained without joining the absent parties.

Note

This section outlines the basic mode of proceeding in actions under this chapter.

Subsection (a) provides that in such actions the district court issue its process for all necessary parties wherever they may be, without regard to district or state lines.

Subsection (b) authorizes transfer of these actions to any other district, even allowing such transfer to be made on the court's own motion prior to service of process on any defendant.

Subsection (c) specifically provides that in selecting applicable state law, the district court need not automatically follow the choice-of-law rule of the state in which it happens to be sitting (or of any other particular state). This is necessary since the several parties may be summoned from various states.

Subsection (d) deals with the special circumstance where a necessary party cannot be served with process, providing that the action shall go on without that person unless the district court concludes that such continuation would work greater injustice than total failure of the action.

Subsection (e) provides for the cases where the smallness of the amount in controversy, compared with the distances over which parties may be compelled to respond, may result in injustice being inflicted simply by prosecution of the action; it provides for discretion in the district court to dispense with the presence of individual parties or to discontinue the action entirely on account of such factors.

Subsection (f) provides that such continuation of the action in the absence of parties who would otherwise be considered necessary (as authorized in the foregoing two subsections) may be conditioned upon appropriate measures to protect affected interests, but that it may in any event be maintained even though an absent party be one who would ordinarily be deemed "indispensable" to the action.

For detailed commentary, see pp. 401-406 *infra*.

§ 2375. *Definitions in actions under dispersed parties and interpleader diversity of citizenship jurisdiction*

For the purposes only of this chapter and of chapter 159 of this title—

(a) a corporation incorporated by more than one territorial jurisdiction shall be deemed to be a citizen only of one of those jurisdictions that will establish diversity of citizenship between the corporation and a party adverse to it; a partnership or other unincorporated association shall be deemed to be a citizen of the territorial jurisdiction where it has its principal place of business;

(b) the term "territorial jurisdiction" means any State or any foreign state;

(c) the word "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any Territory or Possession of the United States;

(d) the word "citizen" includes a State or other territorial jurisdiction or a subdivision thereof, but nothing herein shall be construed to affect sovereign immunity;

(e) a judgment is "fully effective" if it binds a party personally or operates on property within the jurisdiction of the court to an extent sufficient fully to satisfy the claim.

Note

This section provides definitions of certain terms that are used in this chapter and in the section establishing jurisdiction of interpleader actions. These definitions are applicable only in those places.

For detailed commentary, see pp. 407-409 *infra*.

§ 2376. *Dispersed necessary parties in actions in district court under other jurisdictional statutes*

(a) In a civil action instituted in the district court originally under section 1301 of this title, if one or more additional parties necessary for a just adjudication as to a defendant (as defined in section 2373 of this title) cannot otherwise be joined, section 2374 of this title shall be applicable to such action; such parties may be joined under the provisions of that section without regard to their citizenship; and venue otherwise proper shall be unaffected by, and shall be proper as to, any such parties.

(b) In a civil action wherein jurisdiction is founded solely on diversity of citizenship under section 1301 of this title, if a counterclaim compulsory under the applicable rule is asserted and one or more additional parties necessary for

a just adjudication of that claim as to any present party cannot otherwise be joined, section 2374 of this title shall be applicable to such action; such parties may be joined under the provisions of that section without regard to their citizenship; and venue otherwise proper shall be unaffected by, and shall be proper as to, any such parties. A party is necessary for a just adjudication of a counterclaim as to a present party, for purposes of this subsection, if he would be thus necessary, under section 2371 or 2373 of this title, in an original action on the same claim.

Note

This section provides for extending the provisions of this chapter (specifically § 2374) to actions already in federal court under other jurisdictional grants, in which necessary parties are absent beyond the reach of normal process.

Subsection (a) provides for joining such absent parties whose presence is necessary to assure a defendant a just adjudication in actions brought originally under general diversity of citizenship jurisdiction.

Subsection (b) provides for bringing in parties (who cannot otherwise be joined) whose presence is necessary for just adjudication of a counterclaim that has been asserted in an action in federal court under general diversity of citizenship jurisdiction.

For detailed commentary, see pp. 409-410 *infra*.

MULTI-PARTY MULTI-STATE DIVERSITY JURISDICTION

I. GENERAL STATEMENT

A. The Problem

The complexity and rapid communication that characterize our modern society result, in the context of litigation, in an increasing proportion of lawsuits involving more than two parties and events in more than one state. The effective resolution of such controversies poses special problems in a federal system such as ours, premised as it is upon the several states as the basic law-making and law-adjudicating units of government. For it remains true that in great bulk these transactions continue to be governed by state law, properly adjudicated in state tribunals. At the same time, efficient disposition of lawsuits involving such complex transactions often calls for bringing in multiple parties, perhaps from several different places.

The state courts are no longer as restricted as they once were in securing the presence of such parties. Earlier concepts of federal constitutional "due process," which began with the notion that "The foundation of jurisdiction is the power," severely limited the reach of a state's judicial tribunals. *McDonald v. Mabee*, 243 U.S. 90 (1917); *Pennoyer v. Neff*, 95 U.S. 714 (1877).¹ More recently, other less tangible relationships with a state have been seen as sufficient to support a state's exercise of personal jurisdiction. Apparently in recognition of the growing complexity and spread of multi-state relationships, more flexible doctrines have been evolved which take into account a far wider range of contacts and considerations as supporting the exercise of judicial jurisdiction over persons not physically within the state. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *cf. Hanson v. Denckla*, 357 U.S. 235, 251 (1958). One leading commentator has summarized the present approach in the following terms:

"The new, flexible standard * * * comes to this: A state may exercise personal jurisdiction whenever, in the context of our federal system, it is reasonable for the state to try the particular case against the particular defendant. In other words, the modern test depends upon the relation between the state and the particular litigation sued upon. Importance attaches to what, with respect to the action brought, the defendant has caused to be done in the forum state."

Foster, *Expanding Jurisdiction Over Nonresidents*, 32 WISC. BAR BULL., Oct. 1959 Supplement 4.

In line with this broader authority, states have begun to extend substantially the reach of their court process, by means of expansive reinterpretation of older statutes as well as enactment of new legislation. In addition to the now universal provisions for subjecting foreign corporations doing business within a state and

¹ The discussion in the text deals with judicial jurisdiction *in personam*. The power of state courts to act *in rem* is well established, and is of course highly relevant in assessing the ability of state courts to render effective relief in specific kinds of cases involving multiple parties. *Of. § 2375(e)* and commentary thereon, *infra*.

non-resident operators of motor vehicles therein to the process of state courts, at least ten [sixteen] states have already adopted "long arm" statutes of wide applicability,² and this movement is clearly gaining momentum. In 1962 a Uniform Interstate and International Procedure Act was promulgated, embodying provisions for the exercise of personal jurisdiction by a state over parties bearing a wide variety of relationships to it.³ Problems of course remain. Until statutes of this type are universally adopted, complex multi-state transactions will still pose difficulties in the courts of states that have not authorized the broader reach of process. Moreover, even when the states have acted to the limits of their power, there will probably [almost certainly] continue to be circumstances where persons who should be present in an action remain constitutionally beyond the reach of the state court's process.

Both of these problems could be met by the provision of a special⁴ substitute federal forum—something that, as a matter of power under the Constitution, may validly be done.⁵ Thus, Congress apparently may found jurisdiction on less than total diversity of citizenship among all adverse parties, and may authorize process of a federal court to run throughout the country, without regard to the respondent's earlier relationships with the particular district to which he is summoned.⁶ But, while such an approach might solve these problems in fact, the question remains as to the justification for such use of the federal courts—or, more precisely, the extent to which federal jurisdiction may appropriately be extended to serve these ends.

² See Idaho Code Ann. § 5-514; Ill. Ann. Stat. c. 110, § 16. 17; Me., Rev. Stat. Ann. c. 112 § 21; Mich. Stat. Ann. § 27A.705; N. Mex. Stat. Ann. § 21-3-16; N.Y. Civ. Prac. Law and Rules § 302(a); 12 Okla. Stat. Ann. § 187; R.I. Gen. Laws Ann. § 9-5-33; Wash. Rev. Code § 4.28.185; Wis. Stat. Ann. § 262.05 [Ga. Code Ann. § 24-113 (1967 Supp.)]; Kans. Stat. Ann. § 60.308(b); Minn. Stat. Ann. § 543.19 (1967 Supp.); Mo. Ann. Stat. § 506.500 (1967 Supp.); Ore. Rev. Stat. § 14-035; Tenn. Code Ann. § 20-235. To satisfy the characterization in the text of "wide applicability" a statute must apply both to corporations and individuals and cover claims in both contract and tort arising out of activity in the state. Some states, e.g., North Carolina, N.C. Gen. Stat. § 55-145(a), have very broad statutes applying to corporations only.]

³ The Act contains the following provisions as to the exercise of personal jurisdiction: Section 1.02. [*Personal Jurisdiction Based Upon Enduring Relationship.*] A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this state as to any [cause of action] [claim for relief].

Section 1.03. [*Personal Jurisdiction Based Upon Conduct.*]

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's

- (1) transacting any business in this state;
- (2) contracting to supply services or things in this state;
- (3) causing tortious injury [in this state] by an act or omission in this state;
- (4) causing tortious injury [in this state] by an act or omission outside the state if he regularly does or solicits business, engages in any other persistent course of conduct in this state or derives substantial revenue from goods or services used or consumed in this state;

[or]
(5) having an interest in, using, or possessing real property in this state [; or
(6) contracting to insure any person, property, or risk located within this state at the time of contracting].

(b) When jurisdiction over a person is based solely upon this section, only a [cause of action] [claim for relief] arising from acts enumerated in this section may be asserted against him.

Section 1.04. [*Service Outside the State.*]

When the exercise of personal jurisdiction is authorized by this Article, service may be made outside this state.

Interestingly, this proposal is narrower in some respects than statutes already in force in some states. See statutes cited in the preceding note. The Uniform Act has been adopted in Arkansas, Ark. Stat. Ann. §§ 27-2501 to 27-2507; Oklahoma, 12 Okla. Stat. Ann. §§ 1701.01 to 1706.04 [Oklahoma had enacted a long arm statute of wide applicability in 1962, two years before adopting the Uniform Act. The two statutes are cumulative and provide alternative methods of exercising extrastate personal service. See *Parks v. Slaughter*, 270 F. Supp. 524 (W.D. Okla. 1967)]; and the Virgin Islands, 5 V.I.C. §§ 4901-4943. [Louisiana, La. R.S. §§ 13-3201-3207; Maryland, Md. Ann Code, art. 75, § 96; Ohio, Ohio Rev. Code §§ 2307.381-85; Virginia, Virginia Code Ann. § 8-81.2; Wyoming, Wyo. Stat. Ann. §§ 5-4.2, 5-4.3 (1967 Supp.)]. It has been proposed in other states and appears to have given added impetus to the movement for broadening "long arm" statutes. Indeed, some of the statutes cited in the previous note, for example those of Kansas and Minnesota, have plainly drawn upon the Uniform Act.]

⁴ When jurisdiction is founded on general diversity of citizenship, the ability of a federal district court to assemble parties dispersed in several states will generally be no greater than that of the state courts in the same place. This is true under existing law, and would not be affected by the proposals advanced herein. See pp. 133-134 *supra*. As to present exceptions to the general rule, including the 1963 amendment to F.R. Civ. Proc. 4(f), which essays an attack on the multiple-party problem insofar as relates to bringing in additional parties who can be served within 100 miles of the courthouse, see Tentative Draft No. 2, p. 79.

⁵ From the point of view of national responsibility for, and appropriateness of, providing such a federal forum, the two sets of circumstances are of course quite different. This question will be treated below.

⁶ See Supporting Memoranda A and B, pp. 426, 437 *infra*.

As pointed out in the Commentary on the general diversity sections, expansion of federal jurisdiction over cases that arise under state law requires affirmative justification; over and above the burden on federal dockets and the special difficulties in the federal determination of state-law issues, there is the basic fact that such adjudication represents a transfer of power from the state courts. Thus, as also stated in that Commentary, the simple fact that more cases might be better—or more efficiently—tried in a federal court is not of itself sufficient justification for such jurisdiction. The problems involved here do not relate simply to trial efficiency at large, but grow out of the multi-state nature of our Union and hence present a special basis for federal intervention. At the same time, the kind of federal forum necessary to meet these problems will involve a greater incursion on state power than is true of general diversity. This grows out of the fact that to serve the purposes sought here, the federal court must be authorized to serve its process anywhere in the country so as to gather in parties scattered in different states. When the parties are thus summoned to a place by uniquely federal authority, there is no basis for subjecting them to the choice-of-law rules (and implicit policies) of the state in which the district court happens to be sitting.⁷ There would be more reason to apply such rules of the state where each party was served (particularly if he was not amenable to process elsewhere), since he presumably could have been subjected to them in the state courts there. But since a single issue may involve parties served in different states, that resolution is not uniformly available either. It must therefore be possible for the federal courts in these cases to exercise an independent choice in selecting the applicable law. Since state choice-of-law may embody policy, the jurisdiction created for present purposes must necessarily contain the power and the actual likelihood of undercutting local policies in cases within its scope.⁸ To the extent that the need for a federal forum to handle these multi-state cases is great enough, such incursion must of course be accepted. The problem thus becomes one of balance, and of judgments that can perhaps be better made in somewhat more specific contexts.

B. Possible Approaches

1. States unable constitutionally to reach all defendants

Perhaps easiest to justify, at least on first impression, would be a jurisdictional grant based upon the constitutional inability of any one state to reach all defendants whom plaintiff is suing. This approach is on its face restricted to creating a multi-state forum that the states are by their nature disabled from providing.

Its difficulties, however, are not insignificant. Among the lesser of these is the fact that such a formulation requires constant definition of the outer reach of state process in essentially constitutional terms. Uncertainty, which is particularly undesirable in defining the scope of a jurisdiction, would thus prevail for a substantial time until the body of constitutional doctrine had been adequately formed. The requirements of the statute would of course bring about crystallization of that body of doctrine more rapidly than its normal development, but that might entail other difficulties; constitutional law is frequently wisely left for more gradual evolution in the light of experience. Nevertheless, if these were the only problems, they might be faced, or at least minimized by the formulation of a relatively determinate statutory standard approximating, but not literally embodying, the line of constitutional power.

Of greater and more immediate import, any approach related only to the constitutional disability of the states would continue to leave a significant number of multi-state cases without any adequate forum—and, indeed, some without

⁷ In general diversity jurisdiction, the reach of the district court's process is essentially co-extensive with that of the local courts of the state where it is sitting. See note 4 *supra*. The rule that the federal court must apply the choice-of-law of that state is then highly appropriate. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); Cavers, *Memorandum on Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, Tentative Draft No. 1, p. 154.

⁸ The discussion in the text focuses on the impact in states in which process is served. The jurisdiction might also make inroads on the policies of the state in which the district court sits (though no party was served there). Thus if venue in federal actions within this jurisdiction is placed in districts where events occurred, and if the quantum of events which satisfied this test of venue were less than that which the state for reasons of policy (e.g., encouraging foreign corporations and individuals, to undertake activities there) set up as a basis for amenability to suit in state court there, the federal statute might operate to undercut the state's policy.

any judicial forum at all. The latter possibility grows out of the doctrine of so-called "indispensable" parties under which a state court may dismiss a lawsuit entirely, refusing to adjudicate among those who are present before it because others with closely related interests are not present and cannot be joined. Under such circumstances, unless the inability to serve the absentees is of constitutional dimension, a jurisdictional grant predicated on state incapacity would not be applicable and the parties would be left entirely without an available forum for the adjudication of their disputes. Similar, though less dramatic, results would apply in cases where the state courts would proceed to adjudicate but where the absence of other persons might impede an adequate disposition or impose unfair burdens on persons involved. To be sure, the approach presently under consideration would provide for all such cases where the state could not constitutionally reach the absentees, and the deficiency in the remaining cases would thus be within state power to cure. At the same time, that fact is of little avail to a person presently involved in a multi-state controversy for which there is no adequate—or no—judicial forum available. Thus, at least where the need for joining scattered parties is great enough, it seems appropriate to provide a federal forum based not merely on lack of state power, but on the fact that such power has not actually been implemented.

2. State process in fact insufficient to reach all named defendants

At the other extreme, federal jurisdiction might conceivably be extended to every case in which a plaintiff could not actually serve out of a single state forum all parties whom he properly seeks to join in a single action.⁹ Such an approach would undertake to encompass every case in which a person might be hindered by limitations of process in pressing a single suit against multiple parties. It would thus certainly include all cases in which the dispersion of persons among several states would create sufficient difficulty in reaching just results to warrant a federal forum for unified disposition.

At the same time, however, many cases could be brought in federal court, under such a jurisdictional grant, in which state courts could actually provide effective justice (though perhaps somewhat less efficiently). Indeed, it seems likely that the number of cases in this category brought to a federal forum would far exceed the total of those for which the state courts would have been inadequate. The actual volume of such cases, moreover, might well turn out to be of very substantial proportions.¹⁰ Even if no better way could be found to reach the cases of real need, it would be difficult to justify so broad an expansion of federal jurisdiction. To the extent that it is possible to provide a satisfactory statutory formulation that would restrict the jurisdiction to cases involving substantial urgency for joinder of multiple parties, wider extension would certainly be unsupportable. As will be seen, such a formulation is available. Under these circumstances, there is no adequate justification for the incursion on state power that would be involved in the broad approach now being considered.

This basic objection is reinforced by other considerations. For one thing, by taking over so completely in this area, and compensating so fully for shortcomings of state process, such a federal jurisdictional grant would greatly reduce the likelihood of further action by states to extend the reach of their own process. The general objective of making local courts more effective would persist, and would carry some momentum. But the incentive of real need, so often a requisite for effective reform, would be largely eliminated. Indeed, to the extent that substantial interests within a state prefer to litigate in federal court, a statute based upon the unavailability of state process might actually generate opposition to expansion of the reach of state jurisdiction. If there were no present signs of active state concern in this area, or if no delay, however short, could be tolerated, then such consequences might be accepted. But the need, while real and important, does not appear to be of such urgency as to demand immediate relief, and as indicated earlier, the states are moving forward effectively in this area with already noteworthy speed and with growing momentum. Undercutting of this development does not seem desirable.

Other problems of still greater significance grow out of the potential for manipulation that is implicit in the present approach. This potential stems from the fact

⁹ Cf. F.R. Civ. Proc. 20(a): " * * * All persons * * * may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. * * *"

¹⁰ Some especially significant additional factors which may be operative in this regard will be considered shortly.

that in many circumstances giving rise to litigation there are several possible putative defendants or third-party defendants.¹¹ Within this range of putative parties, the decision as to whom and how many to sue is not dictated by inflexible rule, but may be influenced by a variety of considerations. The approach now being projected, under which the availability of a federal forum would turn on which parties were sought to be joined, would thus often put power to create federal jurisdiction in the hands of those instituting litigation or seeking to remove an existing state court action.

This has implications in two directions. One relates to possible impact on the substantive law to be applied. For reasons indicated earlier, a federal forum with power to issue process which traverses state lines cannot be bound to apply the choice-of-law rules of any particular state (whether that in which it sits or where parties are served). The previous discussion focused on the unavoidable results of this aspect of the jurisdiction in undercutting state policies. The potential undesirable effects are magnified when parties are put in a position where they may by their own initiative create the federal jurisdiction which avoids local choice-of-law rules and policies.

The other set of consequences may have much greater practical impact. Parties at times desire a federal forum for reasons that do not relate directly to the grounds for its establishment; those reasons may involve a wide variety of matters, including the comparative condition of trial dockets, discovery procedures, or jury composition. Whenever such motives lead to improper creation of federal jurisdiction, substantial harm results in terms of burdening the federal courts and imposition on other parties. (Compare the experience reported earlier with regard to the appointment of out-of-state executors or administrators for the purpose of creating general diversity jurisdiction.¹²) Those problems would be involved here also. But in present context, where parties' right to invoke a federal forum may depend upon whom they elect to sue, further evils are produced. For incentive is created for suing persons who might not otherwise be sued at all, simply as a means of invoking federal jurisdiction. An unrestrictedly broad statute, without safeguards against abuse in this manner, cannot be supported.

The problems just discussed would present sufficient difficulty if the jurisdiction here being projected were simply enacted today. They would be greatly magnified upon the adoption of the proposals being advanced herewith for the contraction of general diversity jurisdiction. For those proposals would bar a plaintiff (as well as a would-be removing defendant) from invoking a federal forum in his home state on the basis of simple diversity of citizenship.¹³ The jurisdiction here under consideration would then become the only channel for bringing to a federal court in one's own state private litigation not arising under federal law. With efforts to secure a home state federal forum in such cases thus necessarily focused on this jurisdictional grant, it seems reasonable to expect that the number of persons sued (or impleaded) solely for the purposes of creating jurisdiction would be substantial. The implications of this, both for the federal judicial system and for the parties thus sued, need no elaboration. Together with the other factors previously considered, they indicate the need for a more limited grant of federal jurisdiction in multi-party multi-state cases than would be afforded by the approach under consideration.

3. State process in fact insufficient to reach all defendants necessary for a just adjudication

The approach taken in the proposal advanced herewith is directly in terms of the degree of urgency that the multiple parties be joined in a single lawsuit: the predicate for federal jurisdiction is that the parties whose presence is necessary for a just adjudication of the action be dispersed beyond the present actual reach of any one state court. When they are,¹⁴ the action may be brought in a federal district court sitting in a place where operative events occurred, from which process would be issued to bring in all necessary parties

¹¹ The opportunity to involve federal jurisdiction in order to bring in distant parties would presumably be available equally to an original plaintiff and to a defendant in a state court action.

¹² Pp. 117-118 *supra*.

¹³ It should be noted that in this context "home state" covers, both as to original and removal jurisdiction, individuals whose principal place of business or employment is in a state, and businesses with a local establishment in a state in actions arising out of the activities of that establishment.

¹⁴ And, as should almost invariably be the case in such circumstances, there is some (minimal) diversity of citizenship between adverse parties.

regardless of where they might be located. Provision is also made for removal by a defendant of any action commenced in a state court that cannot actually reach all parties whose presence is necessary for just adjudication as to that defendant, with far-reaching federal process then authorized in such circumstances as well.

The criterion "necessary for a just adjudication" carries on its face the justification for whatever incursion on state authority the new jurisdiction may inevitably involve. It is intended to express that degree of urgency for the presence of scattered parties which goes beyond trial efficiency and economy, and involves further elements relating to the adequacy of fairness of a disposition made in the absence of particular parties.¹⁵

Because it is thus restricted, the proposed head of jurisdiction would not encompass that very large class of cases in which the joining of scattered parties in a single action would serve only to facilitate a more expeditious or efficient disposition of the controversy. Realization of these important but less urgent objectives would be left to be accomplished by extension of the reach of state court process. For that very reason, the present proposal would help maintain, rather than undercut, the movement for further reform in the reach of that process.

Nor would the proposed formulation lend itself to easy manipulation or be likely to induce the suing of persons who would not otherwise be joined. The criteria of necessity would be in terms of the relationships of the parties to the underlying transaction as well as to the lawsuit. Moreover, they would include only those situations where the urgency of joinder was high in any event, and very often by reason of facts predating the decision to litigate. Under such circumstances, the likelihood of parties being added solely to establish jurisdiction—or indeed, even the opportunity of finding such parties—will not be substantial.

Finally, though the number of cases that would be comprehended by the proposed formulation cannot be ascertained in advance, it should not be large enough significantly to burden the federal courts. Thus, the proposal here advanced should serve to provide a forum whenever no other adequate one would be available, without unduly impairing state power and responsibility or imposing upon litigants or the federal courts.

(g)

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS,
Des Plaines, Ill., April 24, 1979.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: The National Association of Independent Insurers is a voluntary trade association of more than 420 property and casualty insurance companies. Our member companies write approximately fifty percent of the automobile insurance business in the country. Accordingly, our companies are involved in a large number of lawsuits and are extremely interested in any proposed changes to the nation's legal system.

Our member companies express grave concern for the consequences of the enactment of H.R. 2202.

We do favor changes in the legal system on a State of Federal Court level which would expedite the trial of lawsuits. This bill, however, does not eliminate or expedite any litigation. It simply shifts the litigation from the Federal Courts to the State Courts, which will have to increase their number of judges. We believe this is ironic when it follows on the heels of legislation increasing the number of Federal judges by twenty five percent, and legislation which relieves Federal Courts of bankruptcy jurisdiction.

The diversity jurisdiction granted to the Federal Courts has been in existence for almost 200 years, and should not be treated lightly by Congress. H.R. 2202 would preclude bringing these controversies between citizens of different states involving questions of state law into the Federal Courts. Although the bias our founders sought to balance may not be as evident today, nonetheless it still exists. Our members' claims files are rife with examples of less-than-equal justice with the home court advantage on the opposite side.

¹⁵ The term "necessary for a just adjudication" is used and is further defined in the proposed statute. See § 2371(b) and § 2373(b) and Commentary thereon.

Proponents argue that Federal Court congestion will be relieved under H.R. 2202, with what would appear to be a minimal effect on State Court judges if one divides the number of diversity cases now pending into the total number of State Court judges. This reasoning by averaging is flawed. Obviously, the pending diversity cases are not spread throughout the country, but are more likely concentrated in a small number of states. The suggested shifting of cases ignores the situation that in some cases, particularly in the larger urban areas, the backlog of cases pending before the State Courts is greater than that before the appropriate Federal Courts.

The bill ignores that fact that the elimination of diversity can pose serious jurisdictional problems with reference to venue statutes or that State Courts, unlike Federal Courts, generally cannot enforce their decisions beyond their jurisdictional boundaries. Federal diversity jurisdiction permits complex multi-district litigation, in which a larger number of similar cases or one complicated case involving litigants from many states, to be handled by one team of lawyers and supervised by one court in the important pre-trial stage of the case. It is at this point that most cases are settled. This procedure is unavailable through the State Court system.

We are also very much concerned with the provision in H.R. 2202 which would eliminate the individual jurisdictional amount for each member of a class in a class action. This is an open invitation to class actions which could easily result in doubling existing court calendars. For many years members of a class could aggregate their claims to effect Federal jurisdiction. The Supreme Court recognized the flood-gate that was opened by this procedure and thereafter required the jurisdictional amount for each member of the class.

This bill would remove this protection by eliminating the amount in controversy required in a Federal question case. As a result, class actions based on diversity would no longer exist, but class actions based on questions of Federal Law would be easier to maintain since each plaintiff would no longer be required to have a claim exceeding \$10,000. It would appear that a better control is to raise the jurisdictional amount requirement which should relieve the increasing workload of the Federal District Courts.

NAAI urges on behalf of its membership that H.R. 2202 not be reported favorably out of your subcommittee.

Yours very truly,

PAUL BLUME,
Vice President and General Counsel.

(h)

NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL,
New York, N.Y., April 20, 1979.

HON. ROBERT W. KASTENMEIER,
House Judiciary Committee, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judicial Committee on Diversity, Jurisdiction and Related Problems, House Office Building, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: I am President of the National Association of Railroad Trial Counsel. At our January convention we revisited the question of diversity cases in the Federal courts. Our membership, lawyers who spend their working days trying cases for railroads and other litigants, are today more strongly opposed than ever to the effort to abolish diversity jurisdiction.

I am enclosing a copy of a letter our immediate past President, Stephen Trimble, wrote the Honorable Dennis De Concini, about H.B. 9622. The reasons our trial lawyers opposed that 1978 bill are applicable in 1979 to H.B. 2202. I can add only one thought. Public Law 95-486 has authorized additional judges, 117 District and 35 Circuit. The statistics on which many proponents of 95-486 relied to justify that infusion of judicial talent included diversity cases. There should be no serious thought of deleting close to a quarter of the cases brought in federal court, to the prejudice of the citizens to whom access to the federal courts is so important, until experience has demonstrated, if ever it does, that the expanded federal judicial system cannot conceivably handle the case load and that the people of this country will not support a system large enough to do so.

The right to bring a diversity case in federal court is a most important right, one the citizens of this Country have for centuries had the option of exercising.

Mr. Trimble states a persuasive case against the abolition of that right. The members of the National Association of Railroad Trial Counsel add their voices to his and to the overwhelming cry of the trial bar, plaintiffs' and defendants' alike, that such a fundamental right should not be abolished unless and until it is clearly demonstrated that absolute necessity requires it. At this time in our Country's history there is no such necessity. We urge that H.B. 2202 not be recommended for passage.

Very respectfully,

F. HASTINGS GRIFFIN, Jr.,
President.

(i)

PREPARED STATEMENT OF FREDERICK A. O. SCHWARZ, JR.

Mr. Chairman and members of the Subcommittee, my name is Frederick A. O. Schwarz, Jr. I have been a member of the law firm of Cravath, Swaine & Moore since 1969 except while I had the honor of serving during the 94th Congress as Chief Counsel to the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities. A significant part of my practice involves the defense of defamation actions on behalf of Time Incorporated. This statement is being filed on behalf of Time Incorporated.

We do not oppose the provisions of H.R. 2202 eliminating the diversity jurisdiction of the Federal courts. But we urge amendment of the bill to provide for removal to the Federal courts of cases involving substantial defenses arising under Federal law. We are submitting to the Committee, along with this statement, a draft of such an amendment.

Removal where a substantial Federal defense is asserted is consistent with and, in fact, furthers the stated purpose of the bill. As you are well aware, the bill which passed the House last year, H.R. 9622, was accompanied by H.R. Report 95-893, *Abolition of Diversity of Citizenship Jurisdiction*, which sets forth this purpose (p. 1):

"As a general proposition, it provides that Federal law questions are to be adjudicated in the Federal courts, regardless of the amount in controversy; and diversity cases, which involve questions of State law are to be resolved in the State courts."

Since this is the purpose of the bill, it is an anomaly to keep the door to a Federal forum shut, as it has been under the present statute, merely because the dispositive Federal questions are raised by the defendant and not by the plaintiff. This anomaly—which was created by judicial construction of the removal statute and not by Congress¹—was tolerable so long as removal could be had on diversity of citizenship grounds. But now that diversity jurisdiction is being abolished, the restriction on removal based on a Federal defense should also be eliminated. The rationale of the bill requires that access to Federal courts be dependent on the nature of the issues rather than the alignment of the parties. Thus, it should make no difference which party asserts the Federal law issue.

In the defamation area, for instance, a plaintiff's claims arise under State law, but the power of the State to impose liability for defamation is substantially restricted by the First Amendment to the United States Constitution. Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defamation actions have been litigated almost exclusively in terms of the First Amendment requirements. Is the plaintiff a public figure or official or is he a private individual? What is the required Constitutional standard of fault? Has plaintiff met that Constitutional standard of fault? Has plaintiff met that Constitutional standard? These issues, which happen to be raised first by the defendant, are dispositive; and all of them depend upon the interpretation and application of Federal Constitutional principles. State law issues are rarely dispositive.²

¹ *Tennessee v. Union and Planters' Bank*, 152 U.S. 454 (1894); see American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, p. 188 (1969) [hereinafter "Study of Jurisdiction"].

² In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974), the Supreme Court held that where "the substance of the defamatory statement 'makes substantial danger to reputation apparent'" and the plaintiff is a private individual rather than a public official or public figure, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood" so long as they do not impose liability without fault. But a court will reach this issue only if it first determines as a matter of Federal law that the plaintiff is a private individual and that the statement makes substantial danger to reputation apparent. If the court holds against the plaintiff on either of these issues, the State law question is never reached. Since the Federal defenses, if sustained, are dispositive, these cases stand firmly within the Federal defense removal provision which we propose.

The bill proceeds on the premise that cases involving Federal issues should be heard in Federal courts, but it fails to carry out the premise completely because the bill itself leaves in the State courts all cases involving Federal issues raised by defendants. The amendment being suggested eliminates this problem. By its adoption, the goal of the legislation—the determination of Federal questions by Federal courts and State law questions by State courts—will be completely achieved.

Removal of cases in which a Federal defense is asserted was recommended after extensive study and debate by the American Law Institute ("ALI") in its *of Jurisdiction* § 1312(a) (2) at p. 25 and Commentary at pp. 168 and 187-200. Our proposed amendment to H.R. 2202 is modeled on the ALI's proposal, and much of this discussion is based on the fruits of their exhaustive analysis.

Others who have supported the elimination of diversity jurisdiction also support removal of cases involving a Federal defense. Charles Alan Wright, Charles T. McCormick Professor of Law at the University of Texas Law School, Reporter for the ALI *Study of Jurisdiction*, spoke in favor of similar legislation before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate on May 16, 1972.³ Professor David P. Currie of the University of Chicago Law School also supports Federal defense removal, although he was critical of certain aspects of the ALI proposal.⁴

In addition to the primary justification for Federal defense removal—that Federal issues will be decided by Federal courts—there are additional reasons for permitting removal on this basis. Uniformity in the interpretation and application of Federal law is desirable. This need is particularly important to publishers of nationally circulated publications. In the defamation area, the absence of uniformity may tend to inhibit national publishers because they are forced to comply with the least protective State court interpretations of the Constitution. Although theoretically uniformity could be achieved by Supreme Court review of State court decisions, that is a practical impossibility. Greater uniformity is likely to be achieved within the Federal court system than within fifty separate State court systems.

The ALI study also concludes that Federal claims are more likely to be understood and to get a sympathetic hearing in the Federal courts than in the State courts. *Study of Jurisdiction*, pp. 166-67. The defamation area again is illustrative. Although the State courts have generally performed ably, there have been situations where, due to hostility, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), see Senate Hearings at p. 7-65, or simply a lack of understanding of the Federal issues involved, the State courts have performed less admirably. Moreover, with the adoption of the proposed amendment, the Federal courts will develop even greater expertise than at present in handling Federal question litigation.

Another factor supporting removal is the limitation imposed by a State fact-finding process on any subsequent review by the Supreme Court. This factor is often crucial in defamation cases. See *Study of Jurisdiction*, p. 199:

"The [*New York Times Co. v. Sullivan*] defense is in very large measure dependent on the facts. The kinds of public issues involved in these cases are matters on which feelings run high, and on which the defendant is at the mercy of the jury in its decision as to mutual malice. * * * [A] state court judge can charge the jury on the issue of actual malice in complete accord with the *Sullivan* test, and the jury can return a verdict for a locally popular public figure on an error-free record. Federal constitutional rights ought not to be subject to erosion by an unsympathetic jury's findings of fact. * * * It is of course true that federal juries are not immune from emotion and prejudice, but a principal justification for any federal jurisdiction of federal question cases * * * is that when federal rights are involved there ought to be access to a federal forum for the determination of the facts."

Although this statement has focused on illustrations from the defamation field, it may be that the need for removal based on a federal defense is equally necessary in other fields. This Committee might wish to invite comments from experts in those areas. But the primary reason for this proposed amendment is not its effect on any particular class of cases but its inherent logic.

³ Admiralty Jurisdiction, United States as a Party, General Federal Question Jurisdiction, Three Judge Courts, Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary on S. 1876, the Federal Court Jurisdiction Action of 1971, Part 2, 92nd Cong., 2nd Sess. 763-65 [hereinafter "Senate Hearings"].

⁴ Currie, "The Federal Courts and the American Law Institute," Part II, 36 U. Chi. L. Rev. 268, 271-75 (1969).

We now turn to the specifics of the proposed amendment. Unlike the ALI proposal, it does not require the \$10,000 jurisdictional amount for removal based on a Federal defense. Once Federal question defenses are recognized as being on a par with Federal claims, it is illogical to eliminate the jurisdictional amount for original Federal question jurisdiction and for removal in such cases, as the bill before you does, yet retain it when removal is based on a Federal defense. The ALI feared that lack of a jurisdictional amount would result in the removal of too many cases, *Study of Jurisdiction*, pp. 195-96. Neither the Reporters for the *Study of Jurisdiction*, *id.*, nor we share that fear. Nor do we share the fear that the opportunity for removal based upon a Federal defense will result in harassing tactics against plaintiffs with small claims. *Id.*

Unlike the ALI proposal, the suggested amendment to H.R. 2202 permits only a defendant to remove based on a Federal defense. We would not, however, be opposed to adoption of the ALI proposal permitting a plaintiff against whom such a defense is asserted to remove the case as well.

The proposed amendment adopts the ALI position allowing any defendant to remove without his petition being joined in by all other defendants. It also includes the exceptions from Federal defense removal contained in § 1312(b) of the ALI proposal, although we would not oppose any deletions from that section.

The requirement of the ALI proposal that in order to remove, the Federal defense, if sustained, will be dispositive of the action is retained in the proposed amendment. This seems to be a fair restriction and is consistent with the purpose of the bill. It allows those cases in which Federal law predominates to be heard in Federal courts while leaving in the State courts those cases in which State law is determinative.

PROPOSED AMENDMENT TO H.R. 2202

Sec. 3(e) of the bill is amended to read as follows:

(1) Subsection (a) of section 1441 of title 28, United States Code, is amended by striking out "of which the district courts have original jurisdiction may be removed by the defendant or defendants" and by inserting in lieu thereof "may be removed by any defendant (1) if the action is one of which the district courts of the United States have original jurisdiction, or (2) if a defendant asserts a substantial defense arising under the Constitution, laws, or treaties of the United States which, if sustained, would be dispositive of the action,".

Subsection (b) of section 1441 of title 28, United States Code, is repealed and there is inserted in lieu thereof:

"(b) The following civil actions shall not be removed under subsection (a) of this section from a State court to any district court of the United States: (1) Actions by an employee to recover wages under section 216 of Title 29; (2) Actions against a railroad or its receivers or trustees under sections 51 to 60 of Title 45; (3) Actions for injury to or death of a seaman under section 688 of Title 46; (4) Actions against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, under section 20 of Title 49; (5) Actions arising under the workmen's compensation law of any State; (6) Actions brought by a State or a subdivision thereof, or an officer or agency of a State or subdivision thereof to enforce the constitution, statutes, ordinances, or administrative regulations of such State or subdivision, or actions against a State, subdivision, or officer to require such enforcement; (7) Actions for the condemnation of private property under State law or for the award of compensation therefor; (8) Actions in which the only ground for removal is the defense that the defendant could not constitutionally be subject to process of the courts of the State; and (9) Actions in which the only ground for removal is the claim that the suit is barred by an adjudication from another court that the Constitution or laws of the United States require the State court to honor or that the Constitution or laws of the United States require or forbid recourse to the laws of a particular State."

Title 28, Sec. 1441 as amended:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court may be removed by any defendant: "(1) if the action is one of which the district courts of the United States have original jurisdiction, or "(a) if a defendant asserts a substantial defense arising under the Constitution, laws, or treaties of the United States which, if sustained, would be dispositive of the action, to the district court of the United States for the district and division embracing the place where such action is pending."

"(b) The following civil actions shall not be removed under subsection (a) of this section from a State court to any district court of the United States:

“(1) Actions by an employee to recover wages under section 216 of Title 29;
 “(a) Actions against a railroad or its receivers or trustees under sections 51 to 60 of Title 45;

“(3) Actions for injury to or death of a seaman under section 688 of Title 46;
 “(4) Actions against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, under section 20 of Title 49;

“(5) Actions arising under the workmen's compensation law of any State;
 “(6) Actions brought by a State or a subdivision thereof, or an officer or agency of a State or subdivision thereof, to enforce the constitution, statutes, ordinances, or administrative regulations of such State or subdivision or actions against a State, subdivision, or officer to require such enforcement;

“(7) Actions for the condemnation of private property under State law or for the award of compensation therefor;

“(8) Actions in which the only ground for removal is the defense that the defendant could not constitutionally be subject to process of the courts of the State;

“(9) Actions in which the only ground for removal is the claim that the suit or relitigation of an issue in the suit is barred by an adjudication from another court that the Constitution or laws of the United States require the State court to honor or that the Constitution or laws of the United States require or forbid recourse to the laws of a particular State.” “(c) [No change]” “(d) [No change]”

(j)

STATEMENT OF THE DEFENSE RESEARCH INSTITUTE

INTRODUCTION

The Defense Research Institute is a national organization of more than 7,000 individual defense attorney members and more than 500 corporate members. Our members are concerned with all aspects of the defense of civil litigation.

The Board of Directors of the Defense Research Institute has directed the writer, Burton J. Johnson, as President, to communicate to this subcommittee its views concerning proposed legislation. Our concern relates to certain aspects of H.R. 2202, proposing legislation which would affect federal diversity jurisdiction.

The Defense Research Institute firmly believes that federal diversity jurisdiction performs functions of great value for litigants in civil litigation and for society in general. It does so by providing access to the federal judicial system for those who most need it. This access is valuable because the federal system minimizes the effect of local prejudice on litigation and provides efficient administration of justice. The value of this access was recognized by the framers of the United States Constitution, which confers jurisdiction in the federal courts in diversity cases. Numerous acts of Congress have implemented this constitutional provision.

Because of the salutary purpose and effect of federal diversity jurisdiction, the Defense Research Institute opposes its abolition and thus opposes H.R. 2203. The American Bar Association agrees, opposing either abolition or curtailment of diversity jurisdiction.

The following statement sets forth our reasons for opposition and the issues we consider to be of special concern.

PREJUDICE STILL EXISTS

A foundation of the move to abolish federal diversity jurisdiction is the argument that prejudice against out-of-state litigants in state courts is no longer a significant issue. Attorneys who represent insurers, product manufacturers and other corporate defendants (who are frequently the targets of personal injury suits) would disagree.

Local prejudice is a reality which defendants in civil litigation regularly face. Defendants involved in litigation in state courts must reckon repeatedly with two particularly local problems—sympathy for a local plaintiff and local publicity. These two problems can prejudice a defendant substantially by affecting the determination of liability and damages made by the local jury. Nor does the prejudice caused by local sympathy and publicity affect only the individual defendant involved. Expansion of liability and increases in size of awards cause

a ripple effect, contributing to the current insurance availability and cost problems.

Federal diversity jurisdiction, and the access to the federal court system it supplies, provide a means of minimizing this problem. Currently an out-of-state defendant faced by local prejudice in state court litigation can, and often does, use 28 USC § 1441 to remove the action to federal district court where the juries, being drawn from a broader venire, are less subject to local prejudice. Even where prejudice is more widespread or mere removal does not avoid it, the federal system, through a 28 USC § 1404 transfer, provides a means by which the defendant can escape its impact. For example, in *Haase v. Gilboy*, 246 F.Supp 594 (ED Wis 1965), a defendant in a breach of fiduciary duty action was allowed to transfer the action to another district because of adverse publicity in the original district.

These mechanisms, however, become unavailable in the absence of diversity jurisdiction because diversity jurisdiction is the defendant's means of entry to the federal system. Since similar mechanisms are nonexistent at the state level, in the absence of federal diversity jurisdiction, defendants and all persons paying insurance premiums will be faced with the possibility of increased costs attributable to prejudice-caused increases in awards.

PROCEDURAL BENEFITS OF DIVERSITY JURISDICTION

Federal diversity jurisdiction provides many procedural advantages, unavailable in state courts, which inure to the benefit of litigants and improve overall judicial economy. The advantages lie primarily in the important area of increased efficiency in the resolution of litigation, with concomitant savings in time and money to litigants, to the judicial system, and to society. Some of the more important procedural advantages include procedures for complex litigation and transfer of venue, and the broad federal discovery rules.

The federal procedures for complex and multidistrict litigation under 28 USC § 1407 are of unquestionable importance in the efficient resolution of mass tort cases. Efficiency is important because such cases are generally national in scope, involving hundreds of parties. By providing for coordinated pretrial proceedings, federal procedures prevent costly and time-consuming repetitive discovery. The resulting savings to litigants and courts are tremendous. State courts simply are unable to duplicate the federal procedures.

Even where litigation does not involve numerous parties, federal procedure results in judicial economy. Transfer of venue permitted by 28 USC § 1404, "for the convenience of parties and witnesses, in the interests of justice," makes possible transfer of a case to a federal district in which the case can be most efficiently litigated. By permitting transfer to a district in which an accident occurred or witnesses reside, even if in a state other than the one in which the action originated, the federal procedure—unavailable in or totally beyond the powers of state courts—can effect substantial savings in our judicial system.

The broad scope of pretrial discovery offered in the federal system also promotes economical litigation. By allowing litigants to gain knowledge of their opponent's cases, the federal discovery procedures facilitate pretrial settlement. The result is again a saving in judicial time, especially in products liability cases and other complex litigation. In contrast, the state courts vary widely in the scope and amount of discovery they allow, some allowing only quite limited discovery.

The procedures we have mentioned are not the only federal procedures which benefit litigants and courts in tort litigation. Removal under 28 USC § 1441 is valuable as a mechanism by which qualifying parties can refer a state court action to federal court in cases in which federal handling would be more efficient or economical. In addition, many other aspects of federal procedure, including extraterritorial service of process and subpoena service, facilitate efficient resolution of cases.

Tort and insurance litigation increasingly is becoming interstate, if not multi-state, in nature. It stands to reason that interstate litigation can be resolved most efficiently only if the procedures used in its resolution are correspondingly interstate in nature.

Federal diversity jurisdiction and only federal diversity jurisdiction provides the procedures required to efficiently resolve interstate litigation. Reliance on the far more ponderous available state procedures will result in increased costs to all involved and greater state court backlogs than already exist.

Supporters of the abolition of federal diversity jurisdiction argue that the federal courts are severely congested and that the relinquishment of diversity jurisdiction would go a long way toward easing the burden. Figures fly in support of this argument. In a collateral argument, the abolitionists claim that shifting the burden of diversity cases onto the state court system would impose only a modest increase in the caseload of each state court judge.

These arguments do not sufficiently withstand critical scrutiny, to support convincingly the abolition of a system as beneficial as diversity jurisdiction.

The actual federal court caseload attributable to diversity cases is not as burdensome as claimed. Enlightening statistics were prepared by the Director of the Administrative Office of the United States Courts in his 1976 Annual Report. According to the compilation, something over 31,500 diversity cases were filed in federal courts in 1976. Standing by itself this number may seem large; but in its context it is not. The number must be viewed alongside the over 130,000 total federal filings in 1976. A quick comparison of diversity filings against total filings shows that diversity filings represent less than one quarter of federal cases. The statistics further show that the percentage of diversity filings in relation to total filings has diminished steadily in recent years—decreasing from nearly 29 percent of case filings in 1960 to its 1976 level of 24 percent.

The 31,500 filings figure becomes even less significant when considered in light of the number of federal judges handling these cases. The number of authorized federal judgeships at the district and circuit court level increased substantially between 1970 and 1976, arising from 299 to 496. A comparison of the number of judges with the number of diversity cases leads to a distribution of 64 diversity cases per judge per year. This figure omits consideration of the contribution of the 152 circuit and district senior judges (as well as United States magistrates), who make significant contributions, not only in expediting the total caseload, but also in overseeing pretrial discovery and conducting pretrial conferences. The diminution in the seemingly burdensome weight of the original 31,500 figure, when broken down into average caseload, at the very least necessitates more analysis of the "burden" caused by diversity jurisdiction.

Even the 64 cases per judge figure could be more than halved by recently enacted legislation. The number of federal judges was increased by about 25 percent on a national basis by Pub. L. No. 95-486 92 Stat. 1629. This addition, by itself, would reduce diversity caseload to less than 51 cases per judge each year. The caseload could undergo further substantial reduction under a legislative alternative to H.R. 2202, similar to S. 2094, introduced in the 95th Congress by Senator Eastland. The ABA Special Committee on Coordination of Federal Judicial Improvements, in its recent report to the ABA House of Delegates, noted that more than half of federal diversity cases are being brought in the plaintiff's home states. By making diversity jurisdiction unavailable in these circumstances the diversity caseload of each federal judge could be reduced to 25 cases per year; a little over two per month. Even this number refers only to filings, not to cases actually tried. This is a small price to pay for the benefits endowed by federal diversity jurisdiction on litigants and the judicial system.

The argument by proponents of H.R. 2202 and similar predecessor legislation, that shifting federal diversity cases to state court would have, at most, a moderate impact on state court systems is also open to question. The potential impact of the shift has been expressed tersely by Carole Bellows, who when she was President of the Illinois State Bar, maintained in a statement to Senator DeConcini:

[S]uch legislation [abolition of federal diversity jurisdiction] denies to citizens choice of forum and increases litigation costs and legal fees unnecessarily by forcing them into state courts, which can ill afford additional caseloads. Illinois alone has had a 55 percent increase in caseload in thirteen years with only an 8 percent increase in judicial manpower. Average caseload per state trial judge in Illinois was 5,746 in 1976. We urge your rejection of this legislative proposal because of its burden on the people and the courts.

President Bellows also pointed out, in letters to the United States Senators from Illinois, that "the impact of this legislation would cause more economic hardships in Illinois than perhaps in any other state because of our position as the leading trade center of the United States." Similar concerns could be expressed regarding the caseloads in heavily populated urban areas around the nation, where overburdened civil trial dockets would receive a disastrously heavy share of the burden lifted from the shoulders of the federal judiciary.

One final argument regarding caseload remains. Even assuming the validity of the "court congestion" arguments, the federal court caseload will hardly be improved by the provisions of H.R. 2202 which would eliminate the \$10,000 jurisdictional amount requirement in federal question cases. Elimination of the jurisdictional amount would increase drastically the potential for complex, time-consuming federal class actions. It would sweep aside the limitations set by the United States Supreme Court in *Snyder v. Harris*, 394 US 332 (1969), which precluded maintenance of a class action by any one class member whose claim was less than the jurisdictional amount.

Encouraging proliferation of federal class actions is, at best, inconsistent with the concern over "court congestion," and is hardly a sound step in the direction of cutting federal court caseloads.

AN ACCEPTABLE MODIFICATION OF FEDERAL DIVERSITY JURISDICTION

As our statement makes evident, we believe that federal diversity jurisdiction serves a valuable function, and should remain available to litigants. Our position, however, is tempered by a willingness to accept reasonable modifications. We consider S. 2094, 95th Cong. 1st Sess., such a reasonable modification. By foreclosing diversity jurisdiction only to a plaintiff in a federal district in a state of which he is a citizen, the bill would have reduced the federal caseload while preserving the legitimate values of diversity jurisdiction.

As we have mentioned previously, the ABA Special Committee on Coordination of Federal Judicial Improvements reported that more than half of the federal diversity cases are being brought in the plaintiff's home states. Thus, enactment of legislation similar to S. 2094 would decrease diversity filings by half and would, in addition, decrease the total number of new federal filings by 10 percent. These reductions in filings would certainly ease argued congestion.

The modification proposed in S. 2094 would be equitable. A plaintiff cannot complain reasonably of prejudice in the state courts of his own state. On the other hand, an out-of-state litigant does suffer prejudice. In his support for foreclosure of diversity jurisdiction only to resident plaintiffs, Judge Oberdorfer of the ABA committee: "recommend[ed] continuation of federal jurisdiction for out-of-state parties because he believes that, over the years, local parties enjoy an unfair litigating advantage over those from out-of-state and that this unfair advantage is significantly reduced by federal court diversity jurisdiction."

Also, a plaintiff would not be entirely denied federal diversity jurisdiction by legislation similar to S. 2094. Rather, in choosing it as an alternative to a state court action, he would have to file his action in federal court in either the state where the claim arose or in the state of residence of one of the defendants.

Because of its effect on caseload with no loss in equities, we believe that legislation similar to S. 2094 would be a reasonable modification of federal diversity jurisdiction. It would certainly be an orderly alternative to the precipitous abolition proposed by H.R. 2202.

(k)

THE UNIVERSITY OF TEXAS AT AUSTIN,
SCHOOL OF LAW,
Austin, Tex., February 21, 1979.

HON. ROBERT W. KASTENMEIER,
Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: I appreciate the invitation to testify on the diversity legislation that is being considered by the subcommittee of which you are chairman, and regret very much that my schedule does not permit me to appear in Washington for this purpose.

It is my understanding that H.R. 2202 is identical with the bill on this subject that twice passed the House of Representatives. I strongly supported that bill in 1978, and I continue to support it now. I can think of no single piece of legislation that would do more for the improved administration of justice in the federal courts. It would take away from those courts some 32,000 cases a year that they are ill-equipped to decide, and that are appropriately the business of the state courts, and would free the federal courts to give more time to civil rights cases and other questions of federal law that are the proper work of the federal judiciary.

Since the bills are identical, I am enclosing a copy of the statement on this subject that I submitted last winter to the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee. I continue to believe what I said in that statement and, if you should think it proper, perhaps that statement could be made a part of the record before your subcommittee.

Sincerely yours,

CHARLES ALAN WRIGHT,
McCormick Professor of Law.

PREPARED STATEMENT OF CHARLES ALAN WRIGHT

My name is Charles Alan Wright. I am Charles T. McCormick Professor of Law at The University of Texas. I am here at the request of chairman DeConcini to testify on proposed legislation affecting diversity of citizenship jurisdiction, specifically S. 2094 and S. 2389.

For more than 25 years I have been a law teacher, at the University of Minnesota from 1950 to 1955 and at The University of Texas since that time. I was a visiting professor at the University of Pennsylvania Law School in 1959-60, at the Harvard Law School in 1964-65, and at the Yale Law School in 1968-69. I regularly teach courses in Federal Courts and in Constitutional Law and a seminar on the Supreme Court.

I was the author of a seven volume revision of the Barron & Holtzoff treatise on *Federal Practice and Procedure*, published from 1958 to 1961. That work is now superseded by a new treatise on the same subject of which I am the senior author, with collaboration on particular volumes by Professor Arthur R. Miller of the Harvard Law School, Professor Edward H. Cooper of the University of Michigan Law School, Professor Eugene Gressman of the North Carolina Law School, and Professor Kenneth W. Graham, Jr., of the UCLA Law School. Eighteen volumes of that treatise have been published since 1969. I am the author of a one-volume hornbook, *Wright on Federal Courts*, the third edition of which was published in 1976, and, in collaboration with two others, of *Cases on Federal Courts*, the sixth edition of which was published in 1970. I have also published several other books on legal subjects not relevant to the present concerns of the subcommittee, and have written extensively, on the federal courts and on other subjects, in the law reviews.

From 1961 to 1964 I was a member of the Advisory Committee on Civil Rules, by appointment of Chief Justice Warren, and in 1964 was moved up from that committee to membership on the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to which the various advisory committees report. I served on the Standing Committee until 1976. I have served, by appointment of Chief Justice Burger, on several committees under the auspices of the Federal Judicial Center that examined various aspects of the organization and operation of the federal judicial system, and, since 1971, I have been a member of the Subcommittee on Federal Jurisdiction of the Committee on Court Administration of the Judicial Conference of the United States. I was a member, from its creation in 1971 until it finished its work in 1977, of the Commission on Standards of Judicial Administration of the American Bar Association. Finally from 1963 to 1969 I was Reporter for the American Law Institute Study of Division of Jurisdiction between State and Federal Courts and had responsibility, in collaboration with the Chief Reporter, Professor Richard H. Field, for all parts of that Study except for General Diversity and Multi-Party Multi-State Jurisdiction.

As this account of my experience suggests, my life has been devoted to study about, and work for reform of, the operations of federal courts. This subcommittee has had a splendid record in bringing forward important legislation that has improved the administration of justice in federal courts. On occasion I have had the honor of appearing before the subcommittee or of being consulted by it on these matters, and I am grateful for that. I am particularly glad to be here today because I think that S. 2389, if adopted, would be the most important contribution of any statute in my adult career toward rationalization of the jurisdiction of the federal courts and toward improvement of their operations.

ABOLITION OF DIVERSITY

I strongly support abolition of general diversity jurisdiction (as well as the changes S. 2389 would make on amount in controversy in federal question cases and on venue). If such a sweeping reform is not politically possible, I favor—but

as a second-best alternative—reducing the burdens diversity imposes on the federal courts by barring the in-state plaintiff and by increasing the amount in controversy to \$25,000.

I have not always been of the view I have just stated. In 1963 a distinguished Phoenix practitioner, John P. Frank, published an article entitled *For Maintaining Diversity Jurisdiction*, 73 Yale L.J. 7 (1963). In the opening footnote to that article he noted that he was authorized to state that Judge Charles E. Clark, Judge J. Skelly Wright, Professor James W. Moore, and Professor Charles A. Wright "concur generally in the conclusion here reached."

It is a matter of particular regret to me that I now find myself on the opposite side of this issue from John Frank. Quite aside from the fact that he and I have been close personal friends for nearly 30 years, there is no practicing lawyer in the United States whom I respect more than I do Mr. Frank for his willingness to take immense amounts of time from a busy practice to work for the improvement of the law. Many times over the years he and I have been allies in one or another fight for law or court reform. Indeed, as his article indicated, in 1963 we were allies on the issue of diversity.

But that was 1963, when there were 63,630 civil cases commenced in the district courts and 18,990 of these were diversity cases. *Annual Report of the Director of the Administrative Office of the United States Court* 198 (1963). In the 12-month period ended June 30, 1977, 130,567 civil cases were commenced. Of these, 31,678 cases, or 24.3%, were diversity cases. *Annual Report of the Director of the Administrative Office of the United States Courts* A-14 (1977). As I have watched the civil workload of the federal courts more than doubled over the last 14 years, I have concluded that diversity cases are a luxury we can no longer afford.

The burden that diversity imposes on the federal courts is not fully reflected by the figures on the number of cases commenced. A time study made by the Federal Judicial Center in 1969-70 showed that in that year, when diversity cases constituted 26.2% of civil filings in the federal courts, they took 37.9% of the time the district judges spent on civil cases. Federal Judicial Center, *The 1969-1970 Federal District Court Time Study* 66G, table XVII (1971). And, as Professor Shapiro has recently pointed out, there is support for this finding of the Federal Judicial Center in the statistics that show that the percentage of diversity cases reaching trial has consistently been higher than for civil cases generally, as has been the percentage of diversity cases in which there has been a jury trial. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv.L.Rev. 317, 323 (1977).

Presumably the purpose of diversity jurisdiction was to cure prejudice against those from out of state. There is still far too much prejudice in America today, on grounds of race, religion, wealth, sex, length of hair, and similar irrational factors, but it is doubtful in the extreme that prejudice against a person because he is from another state is any longer a significant factor. See *Asher v. Pacific Power & Light Co.*, 249 F.Supp. 671, 674 (N.D.Cal. 1965); *F & L Drug Corp. v. American Central Insurance Co.*, 200 F.Supp. 718, 723 (D. Conn. 1961).

Undoubtedly there are cases in which a litigant is able to avoid local prejudice by virtue of diversity jurisdiction. One such case of which I have personal knowledge, since I was consulted by the lawyers for the plaintiff, was *Exxon Corp. v. Duval County Ranch Co.*, 406 F.Supp. 1367 (S.D.Tex. 1975). Because Exxon was found to have its principal place of business in New York, it was able to invoke diversity and bring a suit in federal court in Corpus Christi. If diversity had not existed, it would have had to sue in the state court in Duval County, which at that time was notoriously corrupt and under the influence of the political forces that controlled the defendant.

But this, I think, is not an argument for maintaining diversity. Exxon would have had as little chance of winning in Duval County if it had been a Texas corporation with its principal place of business in Houston. The remedy is to improve the administration of justice in the Duval Counties around the country—as Texas has since done in Duval County itself—rather than to provide an unbiased forum for those who happen to be from out of state while denying it to those from in state. We cannot afford to maintain an elaborate and basically illogical mechanism that brings nearly 32,000 cases a year into the federal courts merely because in a very few of those cases this provides a welcome escape from some disgraceful condition in a particular state court.

Nor do I find at all persuasive Professor Shapiro's suggestion that conditions vary so greatly in particular areas of the country that it should be left to the

judges in each district to decide, as a matter of local option, whether to retain diversity as is, to retain it in limited form, or to abolish it altogether. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv.L.Rev. 317 (1977). Pockets of prejudice, such as Duval County was until recently, do exist—though as I have indicated I think that the prejudice extends to others within the state as much as to those from out of state—but federal judicial districts cover large areas. I do not understand that Professor Shapiro's proposal would permit the judges of the Southern District of Texas to retain diversity for Duval County while abolishing it for Houston and Corpus Christi. A pleasant summer some years ago vacationing on Martha's Vineyard leads me to suspect that there may be prejudice against "off-islanders" there—though I think a person from Boston would feel its sting as much as would one from Austin—but that hardly shows that prejudice exists throughout the entire District of Massachusetts.

A second difficulty with Professor Shapiro's proposal is that I doubt very much whether the judges in a particular district have the facilities or the skill to make the sophisticated weighing of "the burdens and benefits of the diversity jurisdiction in the district" that his proposal would require, or to measure the six factors that he would suggest be taken into account. *Id.* at 349. Every study of the use by judges in particular districts of the power to make local rules has demonstrated beyond question that this process is extremely unsatisfactory. See 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3152 (1973); Weinstein, *Reform of Court Rule-Making Procedures* 117-137 (1977); Note, *Rule 83 and the Local Federal Rules*, 67 Col.L.Rev. 1251 (1967); Note, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 Duke L.J. 1011. When this subcommittee, like its counterpart in the House of Representatives, comes to grips with the question of diversity, it is able to hear all points of view expressed by knowledgeable persons from all over the country. It has the assistance of an able staff to marshal evidence, to analyze statistics, and to probe the statements of witnesses at hearings. The decision will be an informed decision. The judges in individual districts lack these advantages. Their decision would be at best impressionistic, at worst whimsical. Thus I feel strongly that whatever decision is made, it must be made for the entire federal judicial system, and not left to local option.

To take these 32,000 cases out of the federal courts, and distribute them over the courts of 50 states, will have no significant impact on the workload of the state courts. This was shown years ago in a notable study by Senator Burdick, when he was chairman of this subcommittee. Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Its Effect on State and Federal Courts*, 48 N.D.L. Rev. 1 (1971). This was confirmed in a notable speech last summer by Chief Justice Robert J. Sheran of Minnesota, and by the action of the Conference of Chief Justices, which on August 3, 1977, adopted a resolution stating that "our federal court system will continue to be overburdened unless increased recognition is given to the role of state courts." With regard to the matter now specifically before the subcommittee, the resolution of the Conference of Chief Justices says: "(5) Our state court systems are able and willing to provide needed relief to the federal court system in such area as: * * * (C) The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts."

But it is argued that even if taking 32,000 cases out of federal courts would provide significant relief to those courts, without unduly burdening the state courts, there is no point in doing so. In the homely phrase of Mr. Frank, when he testified before this subcommittee seven years ago, "there just plainly is not any good in moving the manure from one pile to another pile, particularly when the second pile is bigger." *Diversity Jurisdiction, Hearings on S. 1876 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. 258 (1971).

With the utmost respect for Mr. Frank, I submit that it is simply not true that these 32,000 cases will require as much time of the entire judicial system, state and federal, if they are in state court as if they are in federal court. State courts are, except for some specialized courts, courts of general jurisdiction. Federal courts are without exception courts of limited jurisdiction. A question that must be considered in every case brought in federal court, and that must be considered by the court at any stage in the litigation even if the parties have not raised it, is whether the case is one properly brought in federal court. Wright, *Federal Courts* § 7 (3d ed. 1976). It was Mr. Frank himself, in an important and provoca-

tive book a few years back, who made the penetrating insight that a case is a series of decision points, and that the goal of law reform must be to reduce the number and complexity of these decision points. Frank, *American Law: The Case for Radical Reform* 68 (1969).

Whether a case is properly within the diversity jurisdiction of the federal courts is a wholly useless decision point that vanishes if the case is brought in state court. This is a decision point of great complexity, because the rules on federal jurisdiction are far from being bright lines. Lawyers can easily be mistaken about those rules, and judges frequently must spend much time deciding, and writing lengthy opinions about, whether jurisdiction exists. In my multi-volume Treatise, my collaborators and I devote 414 pages to the rules on diversity jurisdiction. 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 569-855 (1975); 14 *id.* 1-128 (1976). This is in the main volumes alone. The 1978 pocket parts, which will be out momentarily, will swell the total as we note and comment on the reported cases raising problems of this kind in the short time since those volumes were published. But even this is far from all. Amount in controversy has always been almost entirely a problem in diversity litigation, because of the specific statutes granting jurisdiction without regard to amount in almost every category of federal question cases. The complex rules of measuring amount detain us for another 156 pages. 14 *id.* 355-511 (1976). We have a 32-page section on removal in diversity cases, *id.* § 3723, and much of the rest of the 257-page chapter on removal deals with problems that are peculiar to diversity cases. A large part of our lengthy discussion of venue, 15 *id.* 1-199 (1976), is relevant only to venue in diversity cases. As if this were not enough—or far too much—in volumes 4 to 12 of the Treatise there are numerous sections indicating how particular procedural devices are affected by the limitations on federal jurisdiction.

If a diversity case is properly brought in federal court, the court is required to apply whatever substantive law a state court would apply. My collaborators and I have not yet written our chapter on the *Eric* doctrine, so I cannot say how many pages it will be, but I am sufficiently familiar with the complexities of the doctrine to know that the discussion will necessarily be very lengthy and that it consumes much time of the courts. It is, of course, true that the *Eric* doctrine does not apply only in cases in which jurisdiction is based on diversity of citizenship, Wright, *Federal Courts* 285 (3d ed. 1976), but it is equally true that the overwhelming majority of cases in which *Eric* has any application are diversity cases. In these cases the federal judges are required to guess what the state law is rather than having the law announced by the state court judges who alone can speak authoritatively on this point. Federal judges do this as best they can, and in general this is very well indeed, but cases are not infrequent in which it ultimately develops that the federal court was wrong in its prediction of state law. See Hertz, *Misreading the Eric Signs: The Downfall of Diversity*, 61 Ky.L.J. 861 (1973); cf. Thomas, *The Erosion of Eric in the Federal Courts: Is State Law Losing Ground?* 1977 B.Y.U.L.Rev. 1 (1977).

All of these questions—jurisdiction, amount in controversy, venue, removal, *Eric*—are intellectually fascinating. I enjoy thinking about them and trying to work out correct solutions to the new variants on them that arise every year. I have made a comfortable living teaching and writing and consulting with lawyers about them, and fear that the passage of S. 2389 will make me technologically obsolete. Even so, that is a small price to pay for legislation that means that litigants and judges no longer need be concerned about these problems and can go immediately to the merits of the case, rather than wasting time on unnecessary preliminary issues of this kind.

Diversity cases are a smaller percentage of the caseload of the courts of appeals than they are of the district courts. In the year ended June 30, 1977, 1,713 diversity cases were appealed to the courts of appeals. This is 15.6 percent of the civil appeals and 10.9 percent of all appeals in that year. *Annual Report of the Director of the Administrative Office of the United States Courts* A-10 (1977). The number of diversity appeals in the system generally was more than the total number of appeals of all kinds of any circuit except for the Fifth and the Ninth. The situation in the courts of appeals is so desperate that six years ago Congress created a commission to study what can be done to relieve their plight. Act of Oct. 13, 1972, Pub.L. 92-489; 86 Stat. 807. An 11 percent reduction in the caseload of the courts of appeals would not be a panacea for the problems of those beleaguered courts, but it would surely be helpful. In the courts of appeals, as in the district courts, there is reason to think that the burden of diver-

sity cases is even greater than the mere percentage of filings would suggest. A former student of mine, John E. Nelson, III, wrote me on March 14, 1976, to say that after six months as law clerk to a judge of the Fifth Circuit he had changed the view he had expressed in class and now agreed with me that diversity ought to be abolished. His letter presents such an interesting view of the problems diversity causes to an appellate court that, with Mr. Nelson's permission, I am appending it to this statement, noting, of course, that he was expressing only his own views and was not purporting to speak for the judge for whom he was clerking.

It seems to me worth pointing out that if diversity had been abolished at some time in the recent past, there still would have been 98,889 civil cases commenced in federal court in the year ended June 30, 1977, an increase of more than 55 percent over the total of all civil cases, diversity and nondiversity, that were commenced in 1963, when John Frank wrote his Yale article. The federal judicial capacity is still going to be heavily taxed even if diversity is abolished. This suggests that it is much too late for half measures that would narrow diversity jurisdiction but not abolish it. Only complete abolition will give truly meaningful relief, and even it will not turn district judges into ladies and gentlemen of leisure, but will only make their burden somewhat less severe for a few years until the continued growth of federal question and government litigation takes up the slack.

The Act of March 3, 1875, giving the federal courts general federal question jurisdiction meant that the lower federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Frankfurter & Landis, *The Business of the Supreme Court* 65 (1928). A century later, as federal law has proliferated and constitutional rights have multiplied, it is time to confine the federal courts to the vindication of federal law, issues on which they can speak with authority, and to have confidence that the states will provide the same evenhanded justice to those from afar that they give to their own citizens.

S. 2389—IN GENERAL

For all of these reasons, I strongly support complete abolition of general diversity jurisdiction, and think that S. 2389 is well devised to that end. It preserves the very useful interpleader jurisdiction, 28 U.S.C. § 1335, which provides a forum when the claimants are from different states and territorial restrictions on process from a state court make the procedural device of interpleader unavailable in a state forum. It preserves also jurisdiction between citizens of a state and foreign states or citizens or subjects thereof, technically known as alienage jurisdiction. Although logically a strong case can be made that this alienage jurisdiction ought also to be abolished, in terms of workload these cases are insignificant, particularly with the amount requirement increased to \$25,000, and the retention of this jurisdiction can be justified on the basis that an instrumentality of the national government should act when foreign states, citizens, or subjects are parties. Wright, *Federal Courts* 3 (3d ed. 1976).

There are two other important, and highly commendable, features of S. 2389, to which I now turn. These are its provision for venue and for removing the last vestige of an amount in controversy requirement in federal question cases.

S. 2389—VENUE

Abolition of diversity makes it necessary to modify in some way the venue provision of 28 U.S.C. § 1391(a). I think that § 3(d) (1) (B) makes a substantial improvement over the existing statute in deleting the term, "in which the claim arose," which was added in 1966, and substituting instead the language "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." This is language originally proposed by the American Law Institute and was deliberately intended to avoid "the litigation-breeding phrase, 'in which the claim arose,' cf. 28 U.S.C. § 1391(b), with its implication that there is only one such place * * *." A.L.I., *Study of the Division of Jurisdiction between State and Federal Courts* 218 (Off. Dr. 1969). The phrase added to § 1391 in 1966 has indeed been litigation-breeding. The cases are numerous and far from consistent. See 15 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3806 (1976); Comment, *Federal Venue: Locating the Place Where the Claim Arose*, 54 Texas L.Rev. 392 (1976).

The Ninth Circuit, though acknowledging "some technical difficulties with the peculiar wording" of the 1966 amendment, has construed it to mean what the Law Institute said. *Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078, 1080 (9th Cir. 1976), and the Eighth Circuit seems to have done the same thing. *Gardner Engineering Corp. v. Page Engineering Co.*, 434 F.2d 27, 32-33 (8th Cir. 1973). All courts have not done this, however, and the task of courts that wish to take this desirable step has been made more difficult by the fact that in 1976 Congress added subdivision (f) to 28 U.S.C. § 1391 and in that subdivision, which governs actions against a foreign state, used precisely the ALI language. 28 U.S.C. § 1391(f) (1). If Congress uses one phrase in § 1391 (a) and a very different phrase in § 1391(f), it is harder to argue that the phrase in (a) means what is said in (f). This will be even more difficult if Congress should reenact the 1966 language in connection with abolishing diversity when Congress has earlier shown by its addition of (f) that it is aware of the other language. Thus S. 2389 wisely uses the ALI language, which already appears in § 1391(f), for the 1966 phrase, "in which the claim arose."

My only small question about the venue provisions of S. 2389 is that they are in the form of amendments to what is now § 1391(a) and thus would allow the district in which all plaintiffs reside and the district in which all defendants reside as alternative choices for forum. This will give plaintiffs in federal question cases an option they have never had before. Since 1887, when venue statutes were first adopted, the district of plaintiff's residence has been a permissible venue in diversity cases but not in federal question cases. 15 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 7-8 (1976). Similarly the bill would, for the first time, make the district of an alien plaintiff a permissible venue. *Id.* at 53-54. These changes do not trouble me particularly, although in the ALI Study we concluded that the fact that plaintiff resides in a district should not in itself make that district a permissible venue. American Law Institute, *Study of the Division between State and Federal Courts* 30-31 (Off. Dr. 1969). (Both under the ALI Study, and under 28 U.S.C. § 1391(e) (4), which would be preserved by S. 2389, the district of plaintiff's residence would be a proper venue in certain actions against the United States, its agencies, and officers.) I raise the point merely to be sure that the subcommittee is aware that it would be broadening the choice of venue in this respect.

S. 2389—AMOUNT IN CONTROVERSY

S. 2389 would increase the amount in controversy to \$25,000 in suits within the alienage jurisdiction but abolish it for federal question cases. I support the bill in both aspects. I particularly applaud the abolition of an amount requirement in federal question litigation.

The requirement of an amount in controversy for federal questions in 28 U.S.C. § 1331 has long been largely illusory, because of the many statutes, both in Title 28 and elsewhere in the United States Code, that grant jurisdiction of particular classes of cases without requiring any particular amount, and there has been a widespread consensus that the amount requirement should be abolished in those few classes of federal question cases where it in fact applied. American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 172-176 (Off. Dr. 1969); 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3561 (1975).

In 1976 Congress took a long step toward accomplishing this reform. The Act of Oct. 21, 1976, Pub. L. 94-574, § 2, 90 Stat. 2721, amended 28 U.S.C. § 1331 to provide that no amount in controversy is required in any federal question case brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity. Congress understood when it adopted that change that this covered "the only significant instances in which the jurisdictional amount requirement of 28 U.S.C. section 1331 is an effective limitation." H. Rep. No. 94-1656, at 15-16 (1976).

Although the 1976 amendment did end the amount requirement in the most important and least defensible class of federal question cases in which it had previously applied, there are still federal question cases in which more than \$10,000 must be in controversy. The cases are almost certainly few in number, so that retention of the amount requirement does not ease the burdens of the federal courts. Retention for these few cases, however, does mean that lawyers and judges will still have to master the complicated body of law on measuring the amount in controversy when they encounter such a case.

Most important, there is no principled basis for requiring an amount in controversy in these cases. As the American Law Institute said:

* * * [T]hese cases must be tried in some forum. To impose a jurisdictional amount requirement that would keep such cases out of federal court would require them to be heard in state court. In cases within the diversity jurisdiction, it is not inappropriate to require the states to provide a forum for cases involving a small amount. Where the right relied on is federal, the national government should bear the burden of providing a forum to parties who wish to be heard in federal court. Congress has the power to require state courts to hear federal question cases, but to exercise that power in such fashion as to force small claims into state courts, while reserving larger claims for federal courts, would smack too much of regarding the state courts as inferior tribunals, rather than a coordinate system.

ALI Study 174.

The following are the classes of cases in which amount in controversy is still required.

1. *Suits Arising Under Federal Common Law.*—Ever since the landmark case of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), it has been clear that some issues are to be controlled by federal common law, fashioned by the judges. The Court has been properly guarded about expanding the domain of federal common law, *Miree v. DeKalb County*, 97 S. Ct. 2490 (1977), but it does exist and may control in suits by private litigants. E.g., *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U.S. 29 (1956). See generally Wright, *Federal Courts* § 60 (3d ed. 1976); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964).

A case arising under federal common law is a federal question case within § 1331. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). But as that case shows, 406 U.S. at 98-99, more than \$10,000 must be in controversy in a suit based on federal common law and brought under § 1331. The special statutes allowing particular classes of federal question cases to be brought without an amount requirement typically use the phrase "arising under any Act of Congress." E.g., 28 U.S.C. §§ 1337-1340. It is one thing to find that federal common law is within the "laws * * * of the United States" referred to in § 1331, but it could hardly be contended that federal common law is an "Act of Congress."

2. *Suits Challenging the Constitutionality of State Law that Do Not Come Within 28 U.S.C. § 1343(3).*—Most suits challenging on federal grounds the validity of state actions can be brought without regard to amount in controversy under 28 U.S.C. § 1343(3) as civil rights actions. But while the substantive civil rights statute, 42 U.S.C. § 1983, speaks to the deprivation of any rights "secured by the Constitution and laws," its jurisdictional counterpart, § 1343(3), is more limited. It applies only to deprivations of rights "secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens." Thus it is an open question whether a suit challenging a state statute on the ground that it is inconsistent with a federal statute can be brought under § 1343(3). *Hagans v. Lavine*, 415 U.S. 528, 533 n. 5 (1974). Similarly it is an open question whether a suit under the Social Security Act can meet the test that an Act of Congress must be one "providing for equal rights of citizens." Compare *Andrews v. Maher*, 525 F. 2d 113 (2d Cir. 1975), and *Randall v. Goldmark*, 495 F. 2d 356 (1st Cir. 1974), both holding it cannot, with *Blue v. Craig*, 505 F. 2d 830 (4th Cir. 1974), holding that it can. Finally, it is not yet clear that a constitutional challenge to state action based on the Commerce Clause, or some other provision than the Fourteenth Amendment, can be brought under § 1343(3). The Supreme Court only last term went to some effort to find that more than \$10,000 was in controversy in a suit challenging a North Carolina statute on Commerce Clause grounds so that it could sustain jurisdiction under § 1331 and could avoid deciding whether jurisdiction was available under § 1343. *Hunt v. Washington State Apple Advertising Commission*, 97 S.Ct. 2434, 2443-2444 (1977).

3. *Civil Rights Suits Against Municipalities.*—The Supreme Court has held that a municipality—or other local governmental unit—is not a "person" within the meaning of 42 U.S.C. § 1983. Neither damages nor an injunction may be had against a local government under that section. *Monroe v. Pape*, 365 U.S. 167, 187-192 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). As the remand in the *City of Kenosha* case indicates, 412 U.S. at 513-514, an injunction can be had in federal court against a local government for violation of federally-protected rights, but only if more than \$10,000 is in controversy and the suit can come within § 1331. It is not settled whether those whose constitutional

rights have been violated by a local government have an action for damages. A great many lower courts have implied a right of action for damages from the Constitution and have allowed such suits under § 1331 if more than \$10,000 is in controversy. See the case collected in 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3573 (1977 Supp.). Whether such a right to sue for damages can be implied remains an open question in the Supreme Court. *Aldinger v. Howard*, 427 U.S. 1, 4 n. 3 (1976); *Mt. Healthy School District v. Doyle*, 97 S.Ct. 568, 571-572 (1977). If there is such a right of action, suit can be brought in federal court only if more than \$10,000 is in controversy, unless § 1331 is amended.

4. *Miscellaneous Cases.*—It has been held that a suit under 35 U.S.C. § 33, regulating Patent Office practitioners, is not one arising under the patent laws within 28 U.S.C. § 1338(a), and that the amount in controversy requirement of § 1331 applies to such a suit. *Enders v. American Patent Search Co.*, 535 F.2d 1085 (9th Cir. 1976). The United States Arbitration Act, 9 U.S.C. § 1, is held not to be a grant of jurisdiction, so that an action under that statute to compel arbitration requires an independent jurisdictional basis. If that basis is a federal question, apparently more than \$10,000 must be in controversy. 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 368 (1976). Although it has been said that amount in controversy is required in "federal taxpayers' actions," Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 Stan. L. Rev. 396, 406 n. 52 (1976), this is no longer true. Suits for the recovery of taxes erroneously collected may be brought without regard to amount under 28 U.S.C. § 1346(a)(1). See also 28 U.S.C. § 1340. It is apparent from her reference to *Flast v. Cohen*, 392 U.S. 83 (1968), that Professor Goldberg had in mind suits by taxpayers challenging the constitutionality of federal appropriations. These suits will be against federal officers or agencies, and the 1976 amendment has removed the amount requirement for those suits.

A recent statute, the Consumer Product Safety Act of 1972, incorporates by reference, and thus makes expressly applicable, the amount in controversy requirements of 28 U.S.C. § 1331 in suits for damages by person injured by reason of violation of that statute. 15 U.S.C. § 2072(a). Because this is a quite recent determination by Congress that federal courts should not be open to small claims for consumer injuries of this kind, § 3(f) of S. 2389 would preserve that limitation by writing the amount requirement directly in the substantive statute.

Except for the Consumer Product Safety Act cases, where the amount requirement would be preserved, the fourth category of miscellaneous cases is unimportant, but the first three categories are not. Suits arising under federal common law or suits challenging state or local action as in violation of the federal Constitution and statutes are exactly the sort of cases that should be heard by federal courts. There should not be a price tag on admission to federal court for those whose federal rights have been denied.

As introduced the bill that became law in 1976 would have eliminated the requirement of amount in controversy entirely. It was amended by the Senate Judiciary Committee so that the elimination only reached suits against federal officers and agencies. S. Rep. No. 94-996, at 1 (1976). The change was made because "[s]ome concern was voiced by members of the committee that this broad elimination of the jurisdictional amount may possibly result in an unforeseeable increase of the caseload of the Federal courts. * * * The committee has concluded not that a broader elimination of the requirement is inappropriate or would result in any added workload for Federal Courts, but simply that it was unnecessary to achieve the purposes of the bill." *Id.* at 14. Similarly the Department of Justice had noted that the bill as introduced would end the amount requirement entirely in federal question cases, while the Administrative Conference of the United States, which had initiated the legislation, had spoken only to suits against federal officers. The Department said: "We do not know the volume and the character of cases which this further extension would add to federal court dockets. The Administrative Conference Committee report of course did not address the point, and we know of no other study which does. It is conceivable that the small volume of such cases, or their relatively high importance, renders the extension unobjectionable." *Id.* at 23.

I doubt if anyone can give an accurate indication of the number of cases that fall within the four categories I have identified in which the amount in controversy is less than \$10,000. Surely the number must be a very small one. I am fortified in my own belief that this is true by the fact that on October 19, 1977, Joseph F. Spaniol, Jr., of the Administrative Office, who knows more about the statistics of the federal courts than anyone in the country, submitted a statement to the House subcommittee considering legislation similar to S. 2389 in which he said that elimination of what is left of the amount requirement of § 1331 will not have "any appreciable impact on the caseloads of the district courts." These cases will be few in number, but they raise issues of importance for which a federal forum ought to be available. Complete elimination of the amount requirement from § 1331 will simplify the law of federal jurisdiction and will put in on a more principled basis. If there are particular classes of cases in which, for some reason, an amount requirement seems appropriate, this should be written into the substantive statute, as S. 2389 proposes for the Consumer Product Safety Act cases. I endorse without reservation the changes S. 2389 would make on amount in controversy.

S. 2389—REMOVAL

Section 3(c) of S. 2389 would repeal 28 U.S.C. § 1441(b) but preserve, though with their designations changed, the other subsections of § 1441. Since the alienage jurisdiction is being preserved, there will be federal jurisdiction of a suit by an alien against the citizen of the state in which suit is brought. Today the second sentence of § 1441(b) would preclude removal of such a case. Given the proposed repeal of § 1441(b), it would be removable under § 1441(a). If the alien is satisfied to bring his suit in state court, it is hard to think of any reason why the resident defendant should be able to take the case to federal court.

I regret also that § 1441(c) is not being repealed. In my view that very confusing statute cannot constitutionally have any application in federal question cases, 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 648-650 (1976), and there is no indication in the cases that it is ever used in federal question litigation. With the repeal of diversity jurisdiction, the application of § 1441(c) would be confined to cases in which an alien is a defendant, and even then would be needed only if a citizen of a state is also named as a defendant and there is a separate and independent claim or cause of action against one of the defendants and not against the other. If the citizen defendant is a citizen of a state other than the plaintiff § 1441(c) is still not needed. Jurisdiction would exist under what is now § 1332(a) (3). The case would always be removable if the suit is brought in a state other than that in which the citizen defendant resides, and though, as I have noted above, the repeal of § 1441(b) seems to me to have some unintended consequences, its repeal would allow removal, without regard to § 1441(c), if the suit is in the state in which the defendant citizen resides. Thus the only significance of § 1441(c) will be in a case in which there is a separate and independent claim against an alien and the other defendants are citizens of the same state as the plaintiff. That case will be so rare, and § 1441(c) is so confusing and seems to promise so much more than this, that it hardly seems worthwhile keeping the section on the books.

If it is thought important to allow an alien to remove under this circumstance, I think it would be far neater to let an alien remove any case in which he is a defendant, regardless of whether the claim against him is separate and independent from the claim against his citizen codefendants. This could be done by substituting for what is now § 1441(c) the following subdivision:

A citizen or subject of a foreign state who would have been able to remove under subsection (a) of this section is sued alone by any party making claim against him in the State court action may remove the entire action to district court.

The drafting of this is based on § 1304(b) of the ALI Study and it has a parallel in present § 1441(d), which, as amended in 1976, allows a foreign state always to remove.

I regard the points I have made here about removal, and the point I made at the end of my discussion of venue, as very minor matters indeed. S. 2389 does so many important things, and does them so well, that if changing it in the minor particulars I have suggested would delay or jeopardize its enactment, it would be much wiser to pass it as is than to worry about these small details.

S. 2094 is a bill, sponsored originally by the Department of Justice, that would prevent diversity jurisdiction from being invoked by a plaintiff who is a citizen of the state in which he is suing. I have already made it clear that I think the preferable solution is abolition of general diversity jurisdiction, as proposed in S. 2389. S. 2094 is a step in that direction, but only a partial step. If passage of S. 2389 is not possible, then I would support S. 2094 on the "half a loaf" theory, but I would hope that if this half loaf is the best that can be achieved, it would at least be buttered by increasing the jurisdictional amount in diversity cases from \$10,000 to \$25,000. It is difficult to see how there can be any opposition to these changes, even from those who resist complete abolition, although it is my understanding that those who represent personal injury plaintiffs, while opposing any decrease in diversity, say that if there is to be a decrease complete abolition rather than elimination merely of the in-state plaintiff is preferable.

Allowing the in-state plaintiff to choose between his own state court and a federal court makes no sense. Fear of prejudice against those from out of state, the historical though now very shaky justification for diversity, does not explain why a local citizen should be allowed to invoke federal jurisdiction in a suit in his home state against someone from out of state. This illogical choice is given to plaintiffs only. As has been true throughout the history of the federal courts, except for a hiatus from 1875 to 1887, a resident defendant cannot remove a diversity case. 28 U.S.C. § 1441(b).

Elimination of the in-state plaintiff would reduce the volume of diversity litigation, though the exact amount to which it would do so is uncertain. A study by the Administrative Office of cases for the year ended June 30, 1977, shows that 55.4 percent of diversity cases commenced in federal court are by residents of the state, and another 15.1 percent are brought by non-resident companies "doing business in the state." (These figures are remarkably stable. In an earlier study by the Administrative Office, on which I relied in testifying before a subcommittee of the House Judiciary Committee last September, the comparable figures were 55.5 percent and 15.5 percent.) It is not clear whether the cases in which plaintiff was a non-resident company doing business in the state include any—or how many—cases in which the plaintiff is a corporation incorporated elsewhere but with its principal place of business in the state. By virtue of § 1332(c), such a corporation would be deemed a citizen of the state and cases of this kind would be eliminated by an in-state plaintiff provision. Thus S. 2094 would bar commencement in federal court of something between 55.4 percent and 70.5 percent of the diversity cases, or between 14,482 and 18,418 cases in gross. Since S. 2094 would not touch the more than 5,000 diversity cases that came to the federal courts by removal, its effect on the total diversity business of the federal courts would be to reduce it in the first instance by something between 45.7 percent and 58.1 percent.

But even the 45.7 percent that would surely be eliminated in the first instance would not be out of federal court for good. If the plaintiffs in those cases were to be required to sue in their state court, these cases would be removable. By hypothesis, if plaintiff is a citizen of the forum state, diversity exists only if all defendants are citizens of states other than the forum state. Thus, the limitation on removal in 28 U.S.C. § 1441(b) would not prevent removal.

How many defendants would exercise the right to remove, and would on their own initiative bring to federal court cases that are today commenced there by in-state plaintiffs, is wholly a matter of speculation. It would surely not be all of them, and perhaps not many of them. Inertia often induces lawyers to leave a case in state court rather than go to the trouble of removal. In addition, the choice between state and federal court, where a choice is available, is often made for tactical reasons. See Kennedy, *Federal Diversity Jurisdiction*, 10 Kan. L.Rev. 47, 54 (1961); Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 Iowa L.Rev. 933 (1962). In cases where today an in-state plaintiff chooses to sue in federal court, because federal juries are thought to be more generous than state juries or the case will come more rapidly to trial or for some other tactical advantage, the defendant is likely to see this same tactical factor as making the state court advantageous, and thus refrain from removing the case if the law is changed to require the in-state plaintiff

to sue in state court. For these reasons it is impossible to quantify the reduction of workload that adoption of S. 2094 would have. Any reduction in diversity cases is a step in the right direction. S. 2094 would probably make enough of a reduction to be noticeable, but far less than half the reduction that would be achieved by S. 2389.

A further increase in the reduction of cases commenced in federal courts—but again one that cannot be quantified—could be achieved by adding to S. 2094 a provision amending § 1332(a) to raise the amount in controversy to \$25,000. I think that if any part of diversity is to be retained, this is a desirable step, and indeed S. 2389 does this for the alienage jurisdiction that it preserves. (Statutory interpleader under § 1335 serves a very different function, and there is no reason for changing the \$500 amount in controversy requirement of that section). An increase in jurisdictional amount to \$25,000 would roughly compensate for the effect inflation has had since the amount was set at \$10,000 in 1958. In the 12 months ended June 30, 1977, the amount in controversy was under \$25,000 in 31.2 percent of the diversity cases commenced in federal court, and in 31.0 percent of all diversity cases, including both those commenced in federal court and those removed. (The same study shows, however, that in 10.3 percent of all diversity cases the amount in controversy was less than \$10,000, a figure that is difficult to understand.) This suggests that an increase in amount would remove some 7,500 cases if adopted by itself. Many of these cases, however, must also be cases with an in-state plaintiff, and so the total reduction if both reforms are made cannot be gauged by adding 7,500 to the estimate of the number of cases that would be barred from federal court, and would not be removed by defendant, by adoption of an in-state plaintiff bar.

I do not understand why S. 2094 applies only to § 1332(a) (1). I can see why the alienage jurisdiction should be preserved, but I cannot see why the in-state plaintiff should be given the option of commencing his suit in federal court if a citizen or subject of a foreign state or the foreign state itself is a defendant and the action comes under subdivision (2), (3), or (4) of § 1332(a). It would seem better to make the non-invocation provision S. 2094 would add as § 1332(e) applicable to all actions brought under subsection (a), and leave it to the alien to remove if he prefers a federal forum.

S. 2094 recognizes that an in-state plaintiff provision requires that something be done with the general venue statutes. Its solution seems to me sound, except that, for reasons set out in detail earlier in my discussion of S. 2389, I think it would be far better to delete the phrase "in which the claim arose" in what would now be § 1391(a) and substitute the language "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated."

The minor problems that I discussed above in connection with the removal provisions of S. 2389 are not presented by S. 2094. On the other hand, S. 2094 does not now speak to the question of amount in controversy in federal question cases. If, as I would think desirable for reasons stated above, S. 2094 were amended to raise the jurisdictional amount in diversity cases, I think it would also be desirable to include provisions similar to §§ 2 and 3(f) of S. 2389 to remove entirely the amount requirement in federal question cases. This would complete the job Congress began in 1976, and I cannot think it would be controversial or that it would have a significant impact on the caseload of the federal courts.

Thus S. 2094, with its venue provision changed to incorporate the ALI language, and with additions increasing the amount in controversy for diversity but eliminating it for federal question cases would be a useful improvement over the present situation. I think, however, that the complete abolition of general diversity, as proposed by S. 2389, would be greatly preferable.

JACKSON, MISS., March 14, 1976.

Prof. CHARLES ALAN WRIGHT,
University of Texas School of Law,
Austin, Tex.

DEAR PROFESSOR WRIGHT: Perhaps you will recall that in your Federal Courts class in the fall of 1974, I disputed your thesis that diversity jurisdiction should be

abolished or at least curtailed significantly. After six months of clerking for Judge Clark, I have come to the conclusion that you were right, and that in deference to my notion of what a "scholarly profession" should be, I should inform you of my change in views.

In the hope that my impressions may be of some use to you in achieving the desired reform, let me spell out some of them. First, statistics do not reveal the burden imposed by diversity cases because they do not reflect the nuances of case-handling procedure. In this circuit, the summary calendar disposition method requires that some effort be made to resolve as many cases as possible at the screening stage. However, the usual grounds for requiring oral argument are factual complexity, disagreement among the members of the screening panel as to the proper legal rule or its application, and lack of prior "bright spot" precedents in the circuit. All three criteria appear more frequently in diversity cases than in, say, one- or two-issue federal habeas cases; I don't notice much difference between diversity and civil federal question cases on this basis, or between diversity and direct criminal appeals, most of which are multi-issue. The point is that because it is very rare for a single screening panel to consist of three judges from the same state, and because even that panel must screen cases from five other states, the lack of familiarity with the state law results in a somewhat greater willingness to find a reason for placing a diversity case on the oral argument calendar. In this office, I would guess that six to ten times more time and effort is expended on an oral argument case than on a summary calendar case. I can't speak with assurance about other offices, but I believe the range is similar. Further, the summary method usually results in considerable time saving to the second and third judges on the screening panel, who need only check the work of their initiating colleague rather than formulate their ideas from the ground up, as is the custom in cases on oral calendar.

Second, the temptation to move what can be moved as rapidly as possible results in relatively short shrift being given to the very cases the federal courts should be most concerned with: federal habeas, civil rights suits, and federal statutory interpretations. Perhaps if there were less pressure on the docket from diversity cases, there would be less grumbling about the burden imposed by class actions and prisoners' suits (the latter were colorfully characterized at one argument by counsel for an Alabama sheriff as "the disgustin' spect'cle of incaw'rated felons suin' theah keepahs"). I realize that this ground for my change of heart will appeal less to you than to Professor Ward, but my feeling is that whatever the magnitude of the new brand of litigation is to be, it should be determined by its intrinsic merits in rendering federal and state authorities accountable for abuses of authority and not by its role in crowding out or being crowded out by more traditional forms of litigation that state courts have equal or superior expertise in handling.

Finally, there is the problem that the federal courts simply have no interest in deciding these cases except a (presumably shared with state-court judges) belief that justice should be done. *Erie* saps their precedential value on one hand, yet creates groups of cases (fidelity bond adjudications come to mind) where the diversity avenue gives defendants the opportunity to avoid permanently the authoritative state-court determination that would settle the law in both forum state and federal court.

I still think that federal courts are less corrupt, arbitrary and sloppy and more likely to be staffed by top-flight judges than their state counterparts. I have concluded, however, that those advantages are more likely to be maintained if diversity cases are taken off the calendars of the federal courts under some procedure that gives a limited right—perhaps on a showing of clear prejudice to one or more parties—to a federally-conducted trial without depending on Supreme Court certiorari to identify proper cases for its invocation. Perhaps "circuit cert." after pre-screening by the staff attorney's office, would serve as a proper mechanism.

I hope this account will be of some use to you, if only to provide empirical confirmation of ideas you had already anticipated.

Very truly yours,

JOHN E. NELSON III.

APPENDIX II—SUPPLEMENTAL MATERIALS SUBMITTED BY WITNESSES

(a) By Elmo B. Hunter

(1)

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., February 9, 1979.

Mr. MIKE REMINGTON,
Counsel, Subcommittee on Courts-Civil Liberties and Administration of Justice,
Rayburn House, Office Building, Washington, D.C.

DEAR MIKE: Enclosed are the statistics you requested on diversity case filings in the United States District Courts for the twelve month period ending June 30, 1978. This material updates the data we provided for 1977 which was included in your Ninety Fifth Congress' Hearing Record at pages 352-376.

Sincerely yours,

DAVID L. COOK,
Assistant Chief.

Enclosure.

U.S. DISTRICT COURTS, DIVERSITY CASE FILED SHOWING RESIDENCE OF PLAINTIFF, JULY 1, 1977 TO JUNE 30, 1978

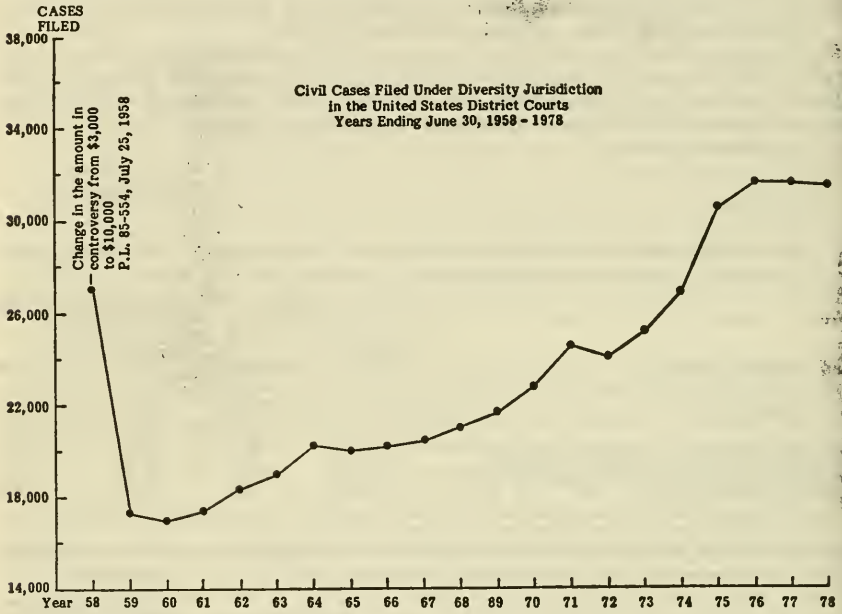
Residence of plaintiff	All diversity cases		Diversity cases, less removals from State courts	
	Number of cases	Percentages	Number of cases	Percentages
Total.....	31, 625	100.0	25, 953	100.0
Resident of the state.....	18, 951	59.9	14, 098	54.3
Nonresident company doing business in the state.....	3, 489	11.0	3, 141	12.1
Nonresident company not doing business in the State.....	2, 974	9.4	2, 833	10.9
Other nonresident.....	6, 211	19.7	5, 881	22.7

U.DISTRICT COURTS, DIVERSITY CASES FILED SHOWING RESIDENCE OF PARTIES, JULY 1, 1977 TO JUNE 30, 1978S.

Residence of parties	All diversity cases		Diversity cases, less removals from State courts	
	Number of cases	Percentages	Number of cases	Percentages
Total.....	31, 625	100.0	25, 953	100.0
Both parties State residents.....	152	.5	129	.5
Plaintiff a State resident and:				
Defendant corporation doing business.....	9, 203	29.1	6, 980	26.9
Defendant corporation not doing business.....	5, 296	16.7	3, 491	13.5
Defendant other nonresident.....	4, 300	13.6	3, 498	13.5
Plaintiff corporation doing business:				
Defendant resident.....	2, 167	6.9	2, 088	8.0
Defendant corporation doing business.....	409	1.3	341	1.3
Defendant corporation not doing business.....	614	1.9	465	1.8
Defendant other nonresident.....	299	.9	247	1.0
Plaintiff corporation not doing business:				
Defendant resident.....	2, 061	6.5	2, 008	7.7
Defendant corporation doing business.....	509	1.6	479	1.8
Defendant corporation not doing business.....	209	.7	169	.7
Defendant other nonresident.....	195	.6	177	.7
Plaintiff other nonresident:				
Defendant resident.....	4, 346	13.7	4, 233	16.3
Defendant corporation doing business.....	998	3.2	919	3.5
Defendant corporation not doing business.....	456	1.5	365	1.4
Defendant other nonresident.....	411	1.3	364	1.4

CODES FOR THE RESIDENCE OF PRINCIPAL PARTIES IN DIVERSITY CASES

	Codes	
	Plaintiff	Defendant
Resident of the State in which case was filed.....	1	1
Nonresident corporation doing business in the State.....	2	2
Nonresident corporation not doing business in the State.....	3	3
Other nonresident.....	4	4



Source: Administrative Office of the United States Courts

TABLE 1.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING RESIDENCE OF PLAINTIFF, JULY 1, 1977 TO JUNE 30, 1978

Circuit and district	Total	Residence of plaintiff			
		1	2	3	4
Total all districts.....	31,625	18,951	3,489	2,974	6,211
District of Columbia.....	377	191	43	21	122
1st circuit.....	1,334	779	119	146	290
Maine.....	104	61	12	7	24
Massachusetts.....	635	396	53	70	116
New Hampshire.....	159	68	12	17	62
Rhode Island.....	167	103	20	9	35
Puerto Rico.....	269	151	22	43	53
2d circuit.....	3,057	1,883	190	309	675
Connecticut.....	299	203	18	16	62
New York Northern.....	112	66	9	6	31
New York Eastern.....	690	483	37	59	111
New York Southern.....	1,753	1,029	115	213	396
New York Western.....	108	61	8	11	28
Vermont.....	95	41	3	4	47

TABLE 1.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING RESIDENCE OF PLAINTIFF, JULY 1, 1977 TO JUNE 30, 1978—Continued

Circuit and district	Total	Residence of plaintiff			
		1	2	3	4
3d circuit.....	3,746	2,070	339	354	983
Delaware.....	103	46	5	4	48
New Jersey.....	1,019	577	94	76	272
Pennsylvania Eastern.....	1,870	1,053	182	153	482
Pennsylvania Middle.....	289	164	18	22	85
Pennsylvania Western.....	465	230	40	99	96
Virgin Islands.....					
4th circuit.....	2,751	1,611	280	242	618
Maryland.....	458	194	27	84	153
North Carolina Eastern.....	110	63	18	9	20
North Carolina Middle.....	84	46	15	12	11
North Carolina Western.....	130	60	23	20	27
South Carolina.....	832	575	88	31	138
Virginia Eastern.....	559	341	49	36	133
Virginia Western.....	229	124	27	18	60
West Virginia Northern.....	80	50	5	3	22
West Virginia Southern.....	269	158	28	29	54
5th Circuit.....	7,213	4,331	842	654	1,286
Alabama Northern.....	620	379	98	57	86
Alabama Middle.....	179	98	26	24	31
Alabama Southern.....	210	138	22	22	28
Florida Northern.....	107	66	12	7	22
Florida Middle.....	304	189	46	21	48
Florida Southern.....	504	288	60	89	67
Georgia Northern.....	752	449	102	92	109
Georgia Middle.....	227	112	30	25	60
Georgia Southern.....	262	139	30	15	78
Louisiana Eastern.....	791	530	68	40	153
Louisiana Middle.....	84	57	5	3	19
Louisiana Western.....	312	218	21	10	63
Mississippi Northern.....	257	137	28	31	61
Mississippi Southern.....	547	321	61	53	112
Texas Northern.....	781	445	131	78	127
Texas Eastern.....	501	349	36	10	106
Texas Southern.....	439	255	54	58	72
Texas Western.....	235	160	12	19	44
Canal one.....	1	1			
6th circuit.....	3,162	1,959	281	354	568
Kentucky Eastern.....	236	93	23	23	97
Kentucky Western.....	166	106	15	12	33
Michigan Eastern.....	1,019	680	58	165	116
Michigan Western.....	129	69	11	14	35
Ohio Northern.....	532	360	53	51	68
Ohio Southern.....	298	163	52	26	57
Tennessee Eastern.....	370	231	31	27	81
Tennessee Middle.....	189	126	20	13	30
Tennessee Western.....	223	131	18	23	51
7th circuit.....	2,633	1,497	536	240	360
Illinois Northern.....	1,381	659	376	176	170
Illinois Eastern.....	146	95	15	10	20
Illinois Southern.....	176	123	14	8	31
Indiana Northern.....	278	172	40	11	55
Indiana Southern.....	431	292	65	21	53
Wisconsin Eastern.....	159	112	19	10	18
Wisconsin Western.....	62	44	7	4	7
8th circuit.....	2,160	1,369	208	182	401
Arkansas Eastern.....	223	166	17	8	32
Arkansas Western.....	215	130	22	10	53
Iowa Northern.....	101	77	4	6	14
Iowa Southern.....	143	89	21	3	30
Minnesota.....	289	188	25	25	51
Missouri Eastern.....	494	332	36	65	61
Missouri Western.....	254	167	24	16	47
Nebraska.....	248	127	35	21	65
North Dakota.....	85	43	13	12	17
South Dakota.....	108	50	11	16	31

TABLE 1.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING RESIDENCE OF PLAINTIFF JULY 1, 1977 TO JUNE 30, 1978—Continued

Circuit and district	Total	Residence of plaintiff			
		1	2	3	4
9th circuit.....	3, 039	1, 944	342	284	469
Alaska.....	80	48	10	13	5
Arizona.....	249	166	27	11	48
California Northern.....	538	373	55	62	41
California Eastern.....	128	84	14	9	19
California Central.....	925	600	83	93	149
California Southern.....	108	70	17	7	14
Hawaii.....	171	76	16	17	62
Idaho.....	108	58	20	9	21
Montana.....	126	85	16	11	14
Nevada.....	132	75	9	5	43
Oregon.....	289	179	42	34	34
Washington Eastern.....	57	37	9	3	8
Washington Western.....	128	83	24	10	11
Guam.....					
Northern Marianas.....					
10th circuit.....	2, 253	1, 312	307	187	447
Colorado.....	327	164	49	28	86
Kansas.....	472	339	47	14	72
New Mexico.....	282	141	27	41	73
Oklahoma Northern.....	214	121	38	32	23
Oklahoma Eastern.....	159	94	21	14	30
Oklahoma Western.....	532	308	93	37	94
Utah.....	164	97	20	14	33
Wyoming.....	103	48	12	7	36

TABLE 2.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING RESIDENCE OF PLAINTIFF (EXCLUSIVE OF CASES REMOVED FROM STATE COURTS), JULY 1, 1977 TO JUNE 30, 1978

Circuit and district	Total	Residence of plaintiff			
		1	2	3	4
Total all districts.....	25, 953	14, 098	3, 141	2, 833	5, 881
District of Columbia.....	362	180	40	20	122
First circuit.....	1, 157	645	104	131	277
Maine.....	87	48	11	6	22
Massachusetts.....	522	310	44	59	109
New Hampshire.....	147	60	11	16	60
Rhode Island.....	146	87	17	8	34
Puerto Rico.....	255	140	21	42	52
Second circuit.....	2, 702	1, 575	170	301	656
Connecticut.....	274	179	18	16	61
New York Northern.....	98	53	9	6	30
New York Eastern.....	605	404	33	58	110
New York Southern.....	1, 542	853	101	208	380
New York Western.....	95	50	8	9	28
Vermont.....	88	36	1	4	47
3d circuit.....	3, 458	1, 821	323	349	965
Delaware.....	100	44	5	4	47
New Jersey.....	892	467	85	73	267
Pennsylvania Eastern.....	1, 769	969	176	153	475
Pennsylvania Middle.....	276	152	17	22	85
Pennsylvania Western.....	421	189	40	97	95
Virgin Islands.....					
4th circuit.....	2, 251	1, 179	252	235	585
Maryland.....	409	158	24	83	144
North Carolina Eastern.....	94	49	16	9	20
North Carolina Middle.....	58	24	13	11	10
North Carolina Western.....	115	50	22	20	23
South Carolina.....	560	328	78	28	126
Virginia Eastern.....	515	304	44	35	132
Virginia Western.....	206	106	25	17	58
West Virginia Northern.....	64	35	5	3	21
West Virginia Southern.....	230	125	25	29	51

TABLE 2.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING RESIDENCE OF PLAINTIFF (EXCLUSIVE OF CASES REMOVED FROM STATE COURTS), JULY 1, 1977 TO JUNE 30, 1978—Continued

Circuit and district	Total	Residence of plaintiff			
		1	2	3	4
5th circuit.....	5,617	3,056	742	608	1,211
Alabama Northern.....	422	206	88	56	72
Alabama Middle.....	132	52	26	23	31
Alabama Southern.....	156	90	18	22	26
Florida Northern.....	88	50	11	7	20
Florida Middle.....	188	100	30	16	42
Florida Southern.....	383	192	50	82	59
Georgia Northern.....	587	309	88	85	105
Georgia Middle.....	207	98	29	25	55
Georgia Southern.....	235	114	30	15	76
Louisiana Eastern.....	687	438	60	36	153
Louisiana Middle.....	66	43	3	3	17
Louisiana Western.....	249	160	18	10	61
Mississippi Northern.....	188	78	23	31	56
Mississippi Southern.....	359	157	53	49	100
Texas Northern.....	659	345	122	71	121
Texas Eastern.....	468	319	33	10	106
Texas Southern.....	349	177	50	53	69
Texas Western.....	193	127	10	14	42
Canal Zone.....	1	1			
6th circuit.....	2,410	1,286	252	343	529
Kentucky Eastern.....	184	45	22	22	95
Kentucky Western.....	107	54	13	12	28
Michigan Eastern.....	647	338	51	158	100
Michigan Western.....	108	51	9	13	35
Ohio Northern.....	478	315	50	49	64
Ohio Southern.....	256	127	46	26	57
Tennessee Eastern.....	303	173	26	27	77
Tennessee Middle.....	134	76	19	13	26
Tennessee Western.....	193	107	16	23	47
7th circuit.....	2,195	1,123	509	231	332
Illinois Northern.....	1,254	562	361	171	160
Illinois Eastern.....	96	52	14	8	22
Illinois Southern.....	92	48	13	7	24
Indiana Northern.....	253	150	40	11	52
Indiana Southern.....	336	202	64	20	50
Wisconsin Eastern.....	123	82	14	10	17
Wisconsin Western.....	41	27	3	4	7
8th circuit.....	1,673	948	178	170	377
Arkansas Eastern.....	161	112	12	8	29
Arkansas Western.....	177	96	20	9	52
Iowa Northern.....	81	57	4	6	14
Iowa Southern.....	99	51	16	3	29
Minnesota.....	223	139	17	21	46
Missouri Eastern.....	358	207	31	63	57
Missouri Western.....	202	121	24	15	42
Nebraska.....	225	109	33	19	64
North Dakota.....	50	16	10	11	13
South Dakota.....	97	40	11	15	31
9th circuit.....	2,343	1,365	292	264	422
Alaska.....	46	22	8	10	6
Arizona.....	189	120	19	10	40
California Northern.....	290	243	47	55	45
California Eastern.....	98	66	12	9	11
California Central.....	751	451	74	90	136
California Southern.....	93	61	15	6	11
Hawaii.....	150	61	14	16	59
Idaho.....	88	43	18	8	19
Montana.....	81	44	15	11	11
Nevada.....	107	55	7	5	40
Oregon.....	233	134	39	31	29
Washington Eastern.....	32	17	6	3	6
Washington Western.....	85	48	18	10	9
Guam.....					
Northern Marianas.....					
10th circuit.....	1,785	917	278	180	410
Colorado.....	255	104	42	28	81
Kansas.....	371	249	41	14	67
New Mexico.....	217	92	21	41	63
Oklahoma Northern.....	159	84	34	28	13
Oklahoma Eastern.....	113	53	20	14	26
Oklahoma Western.....	444	224	91	36	93
Utah.....	138	75	18	13	32
Wyoming.....	88	36	11	6	35

TABLE 3.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PLAINTIFF, JULY 1, 1977 TO JUNE 30, 1978

Nature of suit	Total	Residence of plaintiff			
		1	2	3	4
Total cases.....	31,625	18,951	3,489	2,974	6,210
Contract actions, total.....	15,224	8,257	2,860	2,556	1,551
Insurance.....	3,153	2,084	545	336	188
Marine.....					
Miller Act.....					
Negotiable instruments.....	901	405	154	228	114
Recovery of overpayments and enforcement of judgments.....	172	65	24	42	41
Other contract actions.....	10,998	5,703	2,137	1,950	1,208
Real property actions, total.....	927	446	243	107	131
Condemnation of land.....	4	2	1		1
Foreclosure.....	238	43	138	42	15
Rent, lease, and ejectment.....	120	52	32	21	15
Torts to land.....	234	167	30	16	21
Other real property actions.....	331	182	42	28	79
Tort actions, total.....	15,471	10,246	386	310	4,529
Personal injury:					
Airplane.....	660	376	18	11	255
Assault, libel, and slander.....	600	412	16	14	158
Employers' Liability Act.....					
Marine.....	984	851	16	7	110
Motor vehicle.....	5,169	3,110	55	38	1,658
Medical malpractice.....	283	101		4	178
Other personal injury.....	6,309	4,539	77	51	1,642
Personal property damage:					
Fraud including truth in lending.....	546	339	46	57	104
Other personal property damage.....	920	510	158	128	124
Actions under statutes, total.....					
Antitrust.....					
Bankruptcy suits:					
Trustee.....					
Transfer (9158).....					
Appeal (301).....					
Banks and banking.....					
Civil rights:					
Voting.....					
Jobs.....					
Accommodations.....					
Welfare.....					
Other civil rights.....					
Commerce (ICC rates, etc.).....					
Narcotic Addict Rehabilitation Act.....					
Economic Stabilization Act.....					
Environmental matters.....					
Deportation.....					
Prisoner petitions:					
Motions to vacate sentence.....					
Parole board review.....					
Prison officials, habeas corpus.....					
Prison officials, mandamus, etc.....					
Civil rights.....					
Forfeiture and penalty:					
Agricultural acts.....					
Food and Drug Act.....					
Liquor laws.....					
Railroad and trucking regulations.....					
Air traffic regulations.....					
Occupational Safety and Health Act.....					
Other forfeiture and penalty suits.....					
Labor laws:					
Fair Labor Standards Act.....					
Labor Management Relations Act.....					
Labor Management Reporting and Disclosure Act.....					
Railway Labor Act.....					
Other labor litigation.....					

TABLE 3.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PLAINTIFF, JULY 1, 1977 TO JUNE 30, 1978—Continued

Nature of suit	Total	Residence of plaintiff			
		1	2	3	4
Protected property rights:					
Copyright.....					
Patent.....					
Trademark.....					
Securities, commodities, and exchanges.....					
Social Security laws:					
Black lung cases.....					
Other.....					
State reapportionment suits.....					
Tax suits.....					
Other statutory actions.....					
Other actions, total.....	3	2		1	
Domestic relations.....					
Insanity.....					
Probate.....					
Suits involving local officials.....	2	1		1	
Other.....	1	1			

TABLE 4.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PLAINTIFF, JULY 1, 1977 TO JUNE 30, 1978 (EXCLUDING CASES REMOVED FROM STATE COURTS)

Nature of suit	Total	Residence of plaintiff			
		1	2	3	4
Total cases.....	25,953	14,098	3,141	2,833	5,881
Contract actions, total.....	12,143	5,699	2,576	2,456	1,412
Insurance.....	1,978	1,015	501	319	143
Marine.....					
Miller Act.....					
Negotiable instruments.....	817	341	145	224	107
Recovery of overpayments and enforcement of judgments.....	162	57	24	42	39
Other contract actions.....	9,186	4,286	1,906	1,871	1,123
Real property actions, total.....	710	266	230	98	116
Condemnation of land.....	4	2	1		1
Foreclosure.....	216	31	136	40	9
Rent, lease, and ejectment.....	98	36	28	19	15
Torts to land.....	154	90	30	15	19
Other real property actions.....	238	107	35	24	72
Tort actions, total.....	13,098	8,132	335	278	4,353
Personal injury:					
Airplane.....	590	318	17	9	246
Assault, libel, and slander.....	468	290	14	12	152
Employers' Liability Act.....					
Marine.....	837	716	14	7	100
Motor vehicle.....	4,446	2,483	42	35	1,886
Medical malpractice.....	277	95		4	178
Other personal injury.....	5,256	3,577	64	40	1,575
Personal property damage:					
Fraud including truth in lending.....	490	295	41	53	101
Other personal property damage.....	734	358	143	118	115
Actions under statutes, total.....					
Antitrust.....					
Bankruptcy suits:					
Trustee.....					
Transfer (9158).....					
Appeal (801).....					
Banks and banking.....					

TABLE 4.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PLAINTIFF, JULY 1, 1977 TO JUNE 30, 1978 (EXCLUDING CASES REMOVED FROM STATE COURTS)—Continued

Nature of suit	Total	Residence of plaintiff			
		1	2	3	4
Civil rights:					
Voting.....					
Jobs.....					
Accommodations.....					
Welfare.....					
Other civil rights.....					
Commerce (ICC rates, etc.).....					
Narcotic Addict Rehabilitation Act.....					
Economic Stabilization Act.....					
Environmental matters.....					
Deportation.....					
Prisoner petitions:					
Motions to vacate sentence.....					
Parole board review.....					
Prison officials, habeas corpus.....					
Prison officials, mandamus, etc.....					
Civil rights.....					
Forfeiture and penalty:					
Agricultural acts.....					
Food and Drug Act.....					
Liquor laws.....					
Railroad and trucking regulations.....					
Air traffic regulations.....					
Occupational Safety and Health Act.....					
Other forfeiture and penalty suits.....					
Labor laws:					
Fair Labor Standards Act.....					
Labor Management Relations Act.....					
Labor Management Reporting and Disclosure Act.....					
Railway Labor Act.....					
Other labor litigation.....					
Protected property rights:					
Copyright.....					
Patent.....					
Trademark.....					
Securities, commodities, and exchanges.....					
Social security laws:					
Black lung cases.....					
Other.....					
State reapportionment suits.....					
Tax suits.....					
Other statutory actions.....					
Other actions, total.....	2	1		1	
Domestic relations.....					
Insanity.....					
Probate.....					
Suits involving local officials.....	2	1		1	
Other.....					

TABLE 5.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PARTIES, JULY 1, 1977 TO JUNE 30, 1978

Nature of suit	Total	Residence of parties							
		1-1	1-2	1-3	1-4	2-1	2-2	2-3	2-4
Total cases.....	31, 625	152	9, 203	5, 296	4, 300	2, 167	409	614	299
Contract actions, total.....	15, 224	55	4, 205	2, 520	1, 477	1, 768	338	540	214
Insurance.....	3, 153	8	1, 225	731	120	390	76	50	29
Marine.....									
Miller Act.....									
Negotiable instruments.....	901	4	89	77	235	122	6	9	17
Recovery of overpayments and enforcement of judgments.....	172	1	40	12	12	19	2	2	1
Other contract actions.....	10, 998	42	2, 851	1, 700	1, 110	1, 237	254	479	167
Real property actions, total.....	927	3	236	97	110	207	13	10	13
Condemnation of land.....	4				2	1			
Foreclosure.....	238	1	25	4	13	132	2	1	3
Rent, lease, and ejectment.....	120	1	30	10	11	25	3	2	1
Torts to land.....	234		102	46	19	19	5	2	4
Other real property actions.....	331	1	79	37	65	29	3	5	5

TABLE 5.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PARTIES, JULY 1, 1977 TO JUNE 30, 1978—Continued

Nature of suit	Total	Residence of parties							
		1-1	1-2	1-3	1-4	2-1	2-2	2-3	2-4
Tort actions, total.....	15, 471	94	4, 760	2, 679	2, 713	192	58	64	72
Personal injury:									
Airplane.....	660		215	123	38	8	2	1	7
Assault, libel, and slander.....	600	7	184	105	116	5	1	5	5
Employers' Liability Act.....									
Marine.....	984	10	441	264	136	7	3	4	2
Motor vehicle.....	5, 163	30	916	553	1, 619	24	8	7	16
Medical malpractice.....	283	8	36	5	52				
Other personal injury.....	6, 309	25	2, 556	1, 424	534	34	5	15	23
Personal property damage:									
Fraud including truth in lending.....	546	10	126	68	135	24	2	12	8
Other personal property damage.....	920	4	286	137	83	90	37	20	11
Actions under statutes, total.....									
Antitrust.....									
Bankruptcy suits:									
Trustee.....									
Transfer (915B).....									
Appeal (801).....									
Banks and banking.....									
Civil rights:									
Voting.....									
Jobs.....									
Accommodations.....									
Welfare.....									
Other civil rights.....									
Commerce (ICC rates, etc.).....									
Narcotic Addict Rehabilitation Act.....									
Economic Stabilization Act.....									
Environmental matters.....									
Deportation.....									
Prisoner petitions:									
Motions to vacate sentence.....									
Parole board review.....									
Prison officials, habeas corpus.....									
Prison officials, mandamus, etc.....									
Civil rights.....									
Forfeiture and penalty:									
Agricultural acts.....									
Food and Drug Act.....									
Liquor laws.....									
Railroad and trucking regulations.....									
Air traffic regulations.....									
Occupational Safety and Health Act.....									
Other forfeiture and penalty suits.....									
Labor laws:									
Fair Labor Standards Act.....									
Labor Management Relations Act.....									
Labor Management Reporting and Disclosure Act.....									
Railway Labor Act.....									
Other labor litigation.....									
Protected property rights:									
Copyright.....									
Patent.....									
Trademark.....									
Securities, commodities, and exchanges.....									
Social security laws:									
Black lung cases.....									
Other.....									
State reapportionment suits.....									
Tax suits.....									
Other statutory actions.....									
Other actions, total.....	3		2						
Domestic relations.....									
Insanity.....									
Probate.....									
Suits involving local officials.....	2		1						
Other.....	1		1						

TABLE 5.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PARTIES, JULY 1, 1977 TO JUNE 30, 1978—Continued

Nature of suit	Residence of parties							
	3-1	3-2	3-3	3-4	4-1	4-2	4-3	4-4
Total cases.....	2,061	509	209	195	4,346	998	456	411
Contract actions, total.....	1,820	486	165	135	1,076	248	117	110
Insurance.....	225	42	39	30	82	54	40	12
Marine.....								
Miller Act.....								
Negotiable instruments.....	200	19	3	6	103	3	5	3
Recovery of overpayments and enforcement of judgments.....	33	8		1	36	1	1	3
Other contract actions.....	1,362	367	123	98	855	190	71	92
Real property actions, total.....	72	18	8	9	112	10	3	6
Condemnation of land.....					1			
Foreclosure.....	32	5	1	4	14		1	
Rent, lease, and ejectment.....	14	4	1	2	14	1		
Torts to land.....	11	3	2		12	5	2	2
Other real property actions.....	15	6	4	3	71	4		4
Tort actions, total.....	168	55	36	51	3,158	740	336	295
Personal injury:								
Airplane.....	3	4	1	3	67	113	68	7
Assault, libel, and slander.....	7	1	3	3	119	19	14	6
Employer's Liability Act.....								
Marine.....	5		2		41	45	20	4
Motor vehicle.....	13	3	6	16	1,511	162	64	221
Medical malpractice.....	3	1			171	4		3
Other personal injury.....	34	7	5	5	1,075	365	156	46
Personal property damage:								
Fraud including truth in lending.....	40	9	1	7	85	8	6	5
Other personal property damage.....	63	30	18	17	89	24	8	3
Actions under statutes, total.....								
Antitrust.....								
Bankruptcy suits:								
Trustee.....								
Transfer (915B).....								
Appeal (801).....								
Banks and banking.....								
Civil rights:								
Voting.....								
Jobs.....								
Accommodations.....								
Welfare.....								
Other civil rights.....								
Commerce (ICC rates, etc.).....								
Narcotic Addict Rehabilitation Act.....								
Economic Stabilization Act.....								
Environmental matters.....								
Deportation.....								
Prisoner petitions:								
Motions to vacate sentence.....								
Parole board review.....								
Prison officials, habeas corpus.....								
Prison officials, mandamus, etc.....								
Civil rights.....								
Forfeiture and penalty:								
Agricultural acts.....								
Food and Drug Act.....								
Liquor laws.....								
Railroad and trucking regulations.....								
Air traffic regulations.....								
Occupational Safety and Health Act.....								
Other forfeiture and penalty suits.....								
Labor laws:								
Fair Labor Standards Act.....								
Labor Management Relations Act.....								
Labor Management Reporting and Disclosure Act.....								
Railway Labor Act.....								
Other labor litigation.....								

TABLE 5.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PARTIES, JULY 1, 1977 TO JUNE 30, 1978—Continued

Nature of suit	Residence of parties							
	3-1	3-2	3-3	3-4	4-1	4-2	4-3	4-4
Protected property rights:								
Copyright.....								
Patent.....								
Trademark.....								
Securities, commodities, and exchanges.....								
Social security laws:								
Black lung cases.....								
Other.....								
State reapportionment suits.....								
Tax suits.....								
Other statutory actions.....								
Other actions, total.....								
Domestic relations.....								
Insanity.....								
Probate.....								
Suits involving local officials.....								
Other.....								

TABLE 6.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PARTIES, JULY 1, 1977 TO JUNE 30, 1978 (EXCLUDING CASES REMOVED FROM STATE COURTS)

Nature of suit	Total	Residence of parties							
		1-1	1-2	1-3	1-4	2-1	2-2	2-3	2-4
Total cases.....	25,953	129	6,930	3,491	3,498	2,088	341	465	247
Contract actions, total.....	12,143	41	2,950	1,521	1,187	1,704	285	412	175
Insurance.....	1,978	5	639	289	82	377	62	36	26
Marine.....									
Miller act.....									
Negotiable instruments.....	817	4	79	65	193	121	6	9	9
Recovery of overpayments and enforcement of judgments.....	162	1	36	9	11	19	2	2	1
Other contract actions.....	9,186	31	2,196	1,158	901	1,187	215	365	139
Real property actions, total.....	710	2	143	44	77	204	12	3	11
Condemnation of land.....	4				2	1			
Foreclosure.....	216		18	4	9	131	2		3
Rent, lease, and ejectment.....	98	1	21	5	9	25	3		
Torts to land.....	154		57	23	10	19	5	2	4
Other real property actions.....	238	1	47	12	47	28	2	1	4
Tort actions, total.....	13,098	86	3,886	1,926	2,234	180	44	50	61
Personal injury:									
Airplane.....	590		191	91	36	7	2	1	7
Assault, libel, and slander.....	468	5	128	63	94	5	1	3	5
Employers' Liability Act.....									
Marine.....	837	10	395	187	124	6	3	3	2
Motor vehicle.....	4,446	27	755	402	1,299	20	5	7	10
Medical malpractice.....	277	8	34	5	48				
Other personal injury.....	5,256	22	2,072	1,035	448	30	4	11	19
Personal property damage:									
Fraud including truth in lending.....	450	10	109	55	121	24	1	9	7
Other personal property damage.....	734	4	202	88	64	88	28	16	11

TABLE 6.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND RESIDENCE OF PARTIES, JULY 1, 1977 TO JUNE 30, 1978 (EXCLUDING CASES REMOVED FROM STATE COURTS)—Continued

Nature of suit	Total	Residence of parties							
		1-1	1-2	1-3	1-4	2-1	2-2	2-3	2-4
Actions under statutes, total.....									
Antitrust.....									
Bankruptcy suits:									
Trustee.....									
Transfer (9158).....									
Appeal (801).....									
Banks and banking.....									
Civil rights:									
Voting.....									
Jobs.....									
Accommodations.....									
Welfare.....									
Other civil rights.....									
Commerce (ICC rates, etc.).....									
Narcotic Addict Rehabilitation Act.....									
Economic Stabilization Act.....									
Environmental matters.....									
Deportation.....									
Prisoner petitions:									
Motions to vacate sentence.....									
Parole board review.....									
Prison officials, habeas corpus.....									
Prison officials, mandamus, etc.....									
Civil rights.....									
Forfeiture and penalty:									
Agricultural acts.....									
Food and Drug Act.....									
Liquor laws.....									
Railroad and trucking regulations.....									
Air traffic regulations.....									
Occupational Safety and Health Act.....									
Other forfeiture and penalty suits.....									
Labor laws:									
Fair Labor Standards Act.....									
Labor Management Relations Act.....									
Labor Management Reporting and Disclosure Act.....									
Railway Labor Act.....									
Other labor litigation.....									
Protected property rights:									
Copyright.....									
Patent.....									
Trademark.....									
Securities, commodities, and exchanges.....									
Social security laws:									
Black lung cases.....									
Other.....									
State reapportionment suits.....									
Tax suits.....									
Other statutory actions.....									
Other actions, total.....	2		1						
Domestic relations.....									
Insanity.....									
Probate.....									
Suits involving local officials.....	2		1						
Other.....									
Total cases.....	2,008	479	169	177	4,233	919	365	364	
Contract actions, total.....	1,781	415	136	124	1,022	216	81	93	
Insurance.....	221	37	32	29	75	37	24	7	
Marine.....									
Müller Act.....									
Negotiable instruments.....	198	19	1	6	98	2	4	3	
Recovery of overpayments and enforcement of judgments.....	33	8		1	35	1		3	
Other contract actions.....	1,329	351	103	88	814	176	53	80	

TABLE 7.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND AMOUNT DEMANDED, JULY 1, 1977 TO JUNE 30, 1978

Nature of suit	Total cases filed	Amount of demand in thousands					
		Not reported	Under \$10	\$10 to \$14	\$15 to \$19	\$20 to \$24	Over \$25
Total cases	31,625	8,141	2,153	3,017	1,147	981	16,186
Contract actions, total	15,224	4,483	728	1,676	865	702	6,770
Insurance	3,153	1,324	128	322	118	131	1,130
Marine							
Miller Act							
Negotiable instruments	901	137	27	118	73	39	507
Recovery of overpayments and enforcement of judgments	172	58	5	13	10	6	80
Other contract actions	10,998	2,964	568	1,223	664	526	5,053
Real property actions, total	927	326	62	67	50	51	371
Condemnation of land	4						4
Foreclosure	238	63	7	27	29	29	83
Rent, lease, and ejectment	120	46	16	13	8	4	33
Torts to land	234	50	25	10	5	9	135
Other real property actions	331	167	14	17	8	9	116
Tort actions, total	15,471	3,331	1,363	1,272	232	228	9,045
Personal injury:							
Airplane	660	261	82	35	10	3	269
Assault, libel, and slander	600	135	80	48	6	6	325
Employers' Liability Act							
Marine	984	141	49	82	8	9	695
Motor vehicle	5,169	950	298	423	63	75	3,360
Medical malpractice	283	67	31	27	2	2	154
Other personal injury	6,309	1,414	718	520	75	72	3,510
Personal property damage:							
Fraud including truth in lending	546	156	47	37	15	12	279
Other personal property damage	920	207	58	100	53	49	453
Actions under statutes, total							
Antitrust							
Bankruptcy suits:							
Trustee							
Transfer (915B)							
Appeal (801)							
Banks and banking							
Civil rights:							
Voting							
Jobs							
Accommodations							
Welfare							
Other civil rights							
Commerce (ICC rates, etc.)							
Narcotic Addict Rehabilitation Act							
Economic Stabilization Act							
Environmental matters							
Deportation							
Prisoner petitions:							
Motions to vacate sentence							
Parole board review							
Prison officials, habeas corpus							
Prison officials, mandamus, etc.							
Civil rights							
Forfeiture and penalty:							
Agricultural acts							
Food and Drug Act							
Liquor laws							
Railroad and trucking regulations							
Air traffic regulations							
Occupational Safety and Health Act							
Other forfeiture and penalty suits							
Labor laws:							
Fair Labor Standards Act							
Labor Management Relations Act							
Labor Management Reporting and Disclosure Act							
Railway Labor Act							
Other Labor litigation							

TABLE 7.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND AMOUNT DEMANDED, JULY 1, 1977 TO JUNE 30, 1978—Continued

Nature of suit	Total cases filed	Amount of demand in thousands					Over \$25
		Not reported	Under \$10	\$10 to \$14	\$15 to \$19	\$20 to \$24	
Protected property rights:							
Copyright							
Patent							
Trademark							
Securities, commodities, and exchanges							
Social security laws:							
Black lung cases							
Other							
State reapportionment suits							
Tax suits							
Other statutory actions							
Other actions, total	3	1		2			
Domestic relations							
Insanity							
Probate							
Suits involving local officials	2	1		1			
Other	1			1			

Source: Administrative Office of the U.S. Courts.

TABLE 8.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND AMOUNT DEMANDED, JULY 1, 1977 TO JUNE 30, 1978 (EXCLUDING CASES REMOVED FROM STATE COURTS)

Nature of suit	Total cases filed	Amount of demand in thousands					Over \$25
		Not reported	Under \$10	\$10 to \$14	\$15 to \$19	\$20 to \$24	
Total cases	25,953	6,420	1,817	2,486	931	817	13,482
Contract actions, total	12,143	3,453	578	1,357	726	592	5,437
Insurance	1,978	939	78	178	60	73	650
Marine							
Miller Act							
Negotiable instruments	817	102	22	111	67	37	478
Recovery of overpayments and enforcement of judgments	162	55	4	11	10	6	76
Other contract actions	9,186	2,357	474	1,057	589	476	4,233
Real property actions, total	710	230	53	55	44	44	284
Condemnation of land	4						4
Foreclosure	216	49	6	25	29	27	80
Rent, lease, and ejectment	98	34	15	10	6	4	29
Torts to land	154	31	20	6	3	5	89
Other real property actions	238	116	12	14	6	8	82
Tort actions, total	13,098	2,736	1,186	1,073	161	181	7,761
Personal injury:							
Airplane	590	228	74	33	9	3	243
Assault, libel, and slander	468	92	63	39	5	5	264
Employers' Liability Act							
Marine	837	85	42	64	5	6	635
Motor vehicle	4,446	818	264	377	42	55	2,890
Medical malpractice	277	66	30	27	2	2	150
Other personal injury	5,256	1,131	623	411	41	64	2,986
Personal property damage:							
Fraud including truth in lending	490	141	46	33	14	11	245
Other personal property damage	734	175	44	89	43	35	348

TABLE 8.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING NATURE OF SUIT AND AMOUNT DEMANDED, JULY 1, 1977 TO JUNE 30, 1978 (EXCLUDING CASES REMOVED FROM STATE COURTS)—Con.

Nature of suit	Total cases filed	Amount of demand in thousands					Over \$25
		Not reported	Under \$10	\$10 to \$14	\$15 to \$19	\$20 to \$24	
Actions under statutes, total.....							
Antitrust.....							
Bankruptcy suits:							
Trustee.....							
Transfer (\$15B).....							
Appeal (801).....							
Banks and banking.....							
Civil rights:							
Voting.....							
Jobs.....							
Accommodations.....							
Welfare.....							
Other civil rights.....							
Commerce (ICC rates, etc.).....							
Narcotic Addict Rehabilitation Act).....							
Economic Stabilization Act.....							
Environmental matters.....							
Deportation.....							
Prisoner petitions:							
Motions to vacate sentence.....							
Parole board review.....							
Prison officials, habeas corpus.....							
Prison officials, mandamus, etc.....							
Civil rights.....							
Forfeiture and penalty:							
Agricultural acts.....							
Food and Drug Act.....							
Liquor Laws.....							
Railroad and trucking regulations.....							
Air traffic regulations.....							
Occupational Safety and Health Act.....							
Other forfeiture and penalty suits.....							
Labor laws:							
Fair Labor Standards Act.....							
Labor Management Relations Act.....							
Labor Management Reporting and Disclosure Act.....							
Railway Labor Act.....							
Other labor litigation.....							
Protected property rights:							
Copyright.....							
Patent.....							
Trademark.....							
Securities, commodities, and exchanges.....							
Social security laws:							
Black lung cases.....							
Other.....							
State reapportionment suits.....							
Tax suits.....							
Other statutory actions.....							
Other actions, total.....	2	1		1			
Domestic relations.....							
Insanity.....							
Probate.....							
Suits involving local officials.....	2	1		1			
Other.....							

Source: Administrative Office of the U.S. Courts.

(2)

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FEDERAL DIVERSITY JURISDICTION: THE UNNECESSARY PRECAUTION

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There is an ongoing need to examine anew the purpose the federal courts serve and should serve in our democracy if those courts are to fulfill their constitutional function. This analysis must include as a top priority a proper

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jurisdictional balance between the federal and state court systems and an assignment to each system of those cases most appropriate to that system under the basic principles of federalism. The guiding principle is that there should be federal court jurisdiction when federal questions are at stake and state court jurisdiction when state questions are at stake, and state courts are available to provide an adequate forum.

This article briefly but specifically will review the subject of federal diversity jurisdiction to determine its origin, present purposes, and its viability as a continuing basis for federal jurisdiction. The review necessarily will incorporate a recognition of the burden placed on the federal courts by diversity jurisdiction and a consideration of the ability of the state courts to absorb diversity jurisdiction to the extent it may be relinquished by the federal courts.

ORIGIN OF FEDERAL DIVERSITY JURISDICTION

Federal diversity jurisdiction is made possible by Article III of our Constitution which was drafted so as to permit but not to mandate federal court jurisdiction based on "controversies between citizens of different states and between a state or the citizens thereof and foreign states, citizens or subjects."² The grant of power was not self-executing. The Constitution gave to Congress the power and duty to decide if and to what extent there should be federal diversity jurisdiction.³

At that early hour of our history the courts were quite different from those of today. In a seminal statute, the First Judiciary Act of 1789, Congress created not one set of inferior courts, but two.⁴ Each of the thirteen states was given one district court.⁵ Only thirteen judges (one for each court) were required to conduct the courts' business. Congress also created three circuit courts.⁶ Judges were provided for the Supreme Court, a chief justice and five associates,⁷ and for the district courts, but the circuit courts were given no judges of their own.⁸ Instead the circuit courts were to hold annually two sessions within each district of the circuit and were to consist of two justices of the Supreme Court and the district judge of the district.⁹ Population was sparse, travel very limited, and interstate business was minimal. In this halcyon setting the First Judiciary Act of Congress created diversity jurisdiction.¹⁰ The grant of such jurisdiction had a *de minimis* effect as indications are that few cases were filed on that basis.¹¹

² U.S. Const. art. 3, § 2, cl. 7. The records of the Federal Convention offer no reason for the inclusion of this clause. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928) [hereinafter cited as Friendly, *The Historic Basis*].

³ The Constitution itself speaks only in general of the organization of the federal judiciary. The Federal Convention does record extensive controversy regarding the propriety of establishing any federal courts of original jurisdiction although the necessity for some type of federal judiciary was universally accepted. M. Farrand, *The Framing of the Constitution of the United States* 79 (1913) [hereinafter cited as M. Farrand, *The Framing of the Constitution*]. The proponents of The Virginia Plan pressed for a "National Judiciary [to] be established to consist of one or more supreme tribunals, and inferior tribunals to be chosen by the National Legislature." M. Farrand, *The Records of the Federal Convention of 1787*, at 21-22 (rev. ed. 1937). When the framers failed to agree on the necessity for inferior tribunals as the opponents claimed that state courts could handle adequately all matters, with the national interest protected by the Supreme Court, a compromise was adopted. Congress was authorized "to appoint inferior tribunals." M. Farrand, *The Framing of the Constitution* at 125. The "appoint" wording was adopted and during the course of the convention the phrasing was changed to "ordain and establish," a somewhat more forceful phrase. Nevertheless, the organization of the judiciary system clearly fell into legislative hands. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 511-14 (1928).

⁴ Act of Sept. 24, 1789, 1 Stat. 73.

⁵ *Id.* at § 3. Each district was to have one judge, resident of the district to which he was appointed.

⁶ *Id.* at § 4.

⁷ *Id.* at § 1. By the Act of Mar. 3, 1837, ch. 34, 5 Stat. 176, the Supreme Court was expanded to eight associate justices and a chief justice.

⁸ *Id.* at § 4.

⁹ *Id.* Two of the three members constituted a quorum.

¹⁰ *Id.* at § 11. Subject to a jurisdictional amount, the statute conferred diversity jurisdiction when the suit was between a citizen of the state in which the suit was brought and a citizen of another state. The Act of Mar. 3, 1875, § 1, 18 Stat. 470, first established the language in the present statute, 28 U.S.C. § 1332(a)(1) (1976), merely requiring diverse citizenship. Thus, a citizen of state A could sue a citizen of state B in federal court in state C.

¹¹ Friendly, *The Historic Basis*, *supra* note 1, at 493.

THE ERODING BASES FOR DIVERSITY JURISDICTION

To this day there is no consensus as to why diversity jurisdiction was made a permissive basis of federal court jurisdiction or why Congress adopted it.¹² The topic simply was not debated, and congressional leaders did not explain their action.¹³ The traditional explanation is a fear that state courts in those early days would be prejudiced against non-resident litigants.¹⁴ Mr. Justice Marshall framed the often quoted explanation in an opinion in *Bank of the United States v. Deveau*, in 1809.

However true that fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution [*sic*] itself either entertains apprehensions of suitors, that it has established national tribunals for the decisions of controversies between aliens and a citizen, or between citizens of different states.¹⁵

Whatever prejudice as may have existed in 1789¹⁶ today is acknowledged to be minimal or nonexistent. Ours is a nation of frequent travellers. Many if not most people will reside in more than one state during their lifetimes. People move for personal as well as business reasons. Large interstate corporations transfer their employees (and their families) in the ordinary course of business. Recognition of this trend to move is implicit in the *Shapiro v. Thompson* decision, declaring durational residency requirements invalid in violation of our fundamental right to travel.¹⁷ As our nation's population becomes more homogeneous, the phenomenon of real prejudice by a court based on state of residence fades away. Today's observer generally discounts the possibility that the predilection of a state court in favor of its resident would impair the non-resident's chances for justice.¹⁸ Modern state courts, with their stress on objectivity and fairness, and their sensitive appellate reviews can be relied on to be free of that type of prejudice. Moreover, since federal juries now are drawn from the same registration or voter lists as state jurors,¹⁹ although from a wider area within the state,²⁰ federal juries are no longer blue ribbon panels chosen for their "high degree of intelligence, morality, integrity, and common sense."²¹

Often federal judges have served earlier as state court judges.²² Not only are state and federal juries similarly constituted, but the judges also may come from

¹² The federal courts accepted the grant as a legislative mandate. "If Congress has given the power to this Court, we possess it, not otherwise. . . . Besides Congress is not bound, and it would perhaps, be inexpedient to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the Constitution might warrant." *Turner v. Bank of America*, 1 U.S. (4 Dall.) 8, 10 (1799) (Chase, J.).

¹³ Scholars have examined the record to set out a basis for the adoption of diversity jurisdiction. Friendly, *The Historic Basis*, *supra* note 1. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923) [hereinafter cited as Warren, *New Light on the History of the Federal Judiciary Act*]; "Without diversity jurisdiction, the circuit courts created by the First Judiciary Act would have had very little to do." H. J. Friendly, *Federal Jurisdiction: A General View* 141 (1973) [hereinafter cited as H. J. Friendly, *Federal Jurisdiction*]. See also American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 101 (1969) [hereinafter cited as ALI Study].

¹⁴ There are indications, however, that the fear, perhaps justified, was of the state legislatures which might pass laws unfavorable to out-of-state creditors. Friendly, *The Historic Basis*, *supra* note 1, at 495-96.

¹⁵ 9 U.S. (5 Cranch) 61, 87 (1809).

¹⁶ Prejudice of a state court against citizens of another state and aliens, however, was not realized in cases early in our history. See Friendly, *The Historic Basis*, *supra* note 1, at 493-96.

¹⁷ 394 U.S. 618, 629-31 (1969). In this case, the Supreme Court invalidated the one-year residency requirements for eligibility for welfare assistance and the trend furthered by *Shapiro* is to invalidate artificial distinctions between residents, new and old.

¹⁸ See Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 Ind. L.J. 347 (1977); Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* (1975); *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. of the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 193-94, (1971).

¹⁹ 28 U.S.C. § 1863 (1976), implementing the policy set out in 28 U.S.C. § 1861 (1976). See generally Stanley, *Federal Jury Selection and Service Before and After 1968*, 66 F.R.D. 375 (1975).

²⁰ A federal judicial district (division) generally encompasses more than a single state judicial district.

²¹ 66 F.R.D. at 380, quoting *The Jury System in Federal Courts*, 26 F.R.D. 409, 425 (1961); H. J. Friendly, *Federal Jurisdiction*, *supra* note 12, at 148-49.

²² If a personal testimonial is permitted, it seems strange to me as one who has been a state court judge for 13½ years and one who has sat on all the courts of record of his state—trial, appellate and supreme court—that I then may have been susceptible of such prejudice but have been purged of it for the twelve years I have been a federal judge.

similar backgrounds.²³ State courts always have tried all federal diversity cases if less than the required minimum amount for federal jurisdiction is claimed.²⁴ In addition, concurrent jurisdiction of diversity cases allows any litigant, regardless of the amount claimed, to proceed in a state court.²⁵

A second reason occasionally suggested for retention of federal diversity jurisdiction is that it may provide a forum for litigants not subject to jurisdiction in any single state. This is a remote possibility in view of modern state service statutes²⁶ and state interpleader statutes.²⁷ Also, that problem becomes insignificant as the federal interpleader statute²⁸ and federal question statutes²⁹ remain and provide federal jurisdiction. These statutes assure that a forum always will be available, even if federal diversity jurisdiction were repealed.

A third reason sometimes mentioned is that federal diversity jurisdiction assures a high level of justice (federal) to the traveller or visitor from another state. One of the objections originally made to the inclusion of diversity jurisdiction in the Constitution was that of which law to apply (federal or state) to disputes arising within a state, but having parties residing in different states.³⁰ Indeed, the development of two tiers of justice continued from the time of *Swift v. Tyson*³¹ to the point where the race for the courthouse allowed the winner to affect vital substantial rights.³² The view that the federal courts provide a higher level of justice than would a state was radically shifted by the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins*.³³ The federal courts, since that time, are required to apply the applicable state law, both statutory and judicially developed, in diversity cases.

The federal courts in such cases do not, however, authoritatively determine state law; only state courts do so.³⁴ The diversion of state law litigation to federal tribunals, thus, delays the authoritative development of state law and imposes upon federal courts the risky, laborious and wasteful task of predicting what the state law may be on issues upon which only the state courts may speak with authority. Often the federal courts anticipate a result different from what the

²³ For a scholarly study on the state trial bench, see K. Dolbeare, *Trial Courts in Urban Politics* (1967). A 1963 survey reported that 51.3% of all federal district judges were born in the district in which they sit, while 51.6% attended law school in their districts. Before appointment, 89% of the district judges held government positions in the states encompassing their districts. Vine, *Federal District Judges and Race Relation Cases in the South*, 25 J. Pol. 337, 351-55 (1964). Moreover, federal district judges must live in the district in which they sit, 28 U.S.C. § 134(b) (1976). See also H. J. Friendly, *Federal Jurisdiction*, *supra* note 12, at 146-47.

²⁴ 28 U.S.C. § 1332(a) (1976).

²⁵ Subject, of course, to removal by the defendant, 28 U.S.C. § 1441(b) (1976).

²⁶ A variety of long arm statutes have been adopted. Most statutes detail the acts or consequences in the form that may be used for *in personam* jurisdiction. Arkansas, District of Columbia, Massachusetts, Michigan, Oklahoma, and the Virgin Islands have adopted the Uniform Interstate and International Procedure Act, 13 Uniform Laws Ann. art. I, § 1.03, 279, 285 (1975). For a comprehensive analysis, see Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 Mich. L. Rev. 300 (1970). The standard of reasonableness which limits the reach of state court *in personam* jurisdiction, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), now applies to "all assertions of state court jurisdiction." *Shaffer v. Heitner*, 97 S. Ct. 2569, 2584-85 (1977) (emphasis added).

²⁷ E.g., Mo. Rev. Stat. § 507.060 (1952). See Hazard & Moskowitz, *Historical and Critical Analysis of Interpleader*, 52 Calif. L. Rev. 706 (1964).

²⁸ 28 U.S.C. § 1335 (1976). See ALI Study, *supra* note 12, ch. 160, at 67 for a proposal to allow a federal forum in all diversity cases if no state can obtain jurisdiction.

²⁹ The general statute is 28 U.S.C. § 1331 (1976). Federal legislation has created a multitude of avenues to the federal courts. H. J. Friendly, *Federal Jurisdiction*, *supra* note 12, at 1-4.

³⁰ T. Elliott, *Debates* 397 (1828). See also Friendly, *The Historic Basis*, *supra* note 1, at 490.

³¹ 41 U.S. (16 Pet.) 1 (1842).

³² Although the accepted doctrine was that no body of general federal common law existed, the *Swift v. Tyson* case allowed federal courts in diversity cases in which a state had not established a governing statute to exercise independent judgment. Thus, the litigant facing unfavorable *stare decisis* in his home forum, moved to create diversity jurisdiction and to increase his chances of a favorable decision. See *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1927).

³³ 204 U.S. 64 (1938).

³⁴ The implication of this view is clear from *Erie*, 304 U.S. at 78-80. Indeed, if a federal court deems itself to be predicting the course of state court decisions in matters which properly are reserved to the state, the federal court decision does not preclude a subsequent state determination on the same issue. The federal court, in fact, occupies a precarious, time-consuming role in the selection of an applicable state rule. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 321-23 (1967). See Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954); and H. J. Friendly, *Federal Jurisdiction*, *supra* note 12, at 142-43.

state courts later decide. This is not the way to assure justice to the traveller or visitor from another state; it is counter-productive to the process of justice and is an undesirable and needless interference with state autonomy. Neither is diversity jurisdiction justified in order to encourage free movement and business activity throughout the country. Abolition of diversity jurisdiction in 1978 would neither affect free trade and free movement nor create any impediments to citizens' travel and business.

Another faction believes that the federal courts are superior to state courts, and, hence, should exercise jurisdiction. Certainly, this attitude finds no support as applied to state law problems in which state law controls. Carried to its logical conclusion, this belief would result in the placing of all litigation in the federal court system and would abolish the state courts of this nation.³⁵ Our state courts have exclusive jurisdiction over murder cases with the death penalty applicable,³⁶ they have jurisdiction over crimes calling for sentences up to and including life,³⁷ they have jurisdiction over our property rights,³⁸ our marital rights,³⁹ and inheritance rights.⁴⁰ Historically, they have performed capably. To say that they are not to be trusted with the trial of an automobile collision event because of the happenchance of diversity of citizenship is shocking and illogical.

In practice, diversity jurisdiction today simply provides to a lawyer a tactical weapon with no concurrent advance in the cause of justice. Ingenious attorneys invented a number of devices both to create and to defeat diversity jurisdiction, as it suits their tactical interests in the particular suit: the transfer of a cause of action; an assignment for collection purposes only; a transfer of small interests; change of the state of incorporation,⁴¹ appointment of out-of-state administrators and guardians; and the selection of out-of-state class action representatives. The law books are replete with these cases, and our courts devote substantial attention to ruling on the jurisdictional questions when their time would be better spent on cases more appropriate to the federal court's docket.

THE BURDEN OF DIVERSITY JURISDICTION

Another reason, fully sufficient in itself, should allow the federal courts to be divested of diversity actions—the tremendous burden imposed by these cases. Judge-power is limited and should be kept free for those cases which only the federal courts can handle or which demand the expertise of a federal judge.⁴² We know only too well that the federal courts in recent years have experienced dramatic growth in the number of cases filed.⁴³ During the past 20 years, the number of civil cases filed in the federal district and appellate courts has more

³⁵ Judge Friendly's "maximum model" for federal jurisdiction follows this pattern. Of course, Judge Friendly also assumes that "no one in his senses would advocate . . . the maximum model." H. J. Friendly, *Federal Jurisdiction*, *supra* note 12, at 148-49.

³⁶ N. Abrams, Consultant's Report on Jurisdiction: Chapter Two in Working Papers of the National Commission on Reform of Federal Criminal Laws 33 (July, 1970). For a readable discussion of the limitations of the federal courts in criminal cases, see Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 *Law & Contemp. Prob.* 64 (1948); Warren, *Federal Criminal Laws and the State Courts*, 38 *Harv. L. Rev.* 545 (1925).

³⁷ *Id.*

³⁸ *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811). Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 *U. Chi. L. Rev.* 775, 784-86 (1958). See *Developments in the Law—State Court Jurisdiction*, 73 *Harv. L. Rev.* 909, 980-83 (1960).

³⁹ *Williams v. North Carolina*, 317 U.S. 287 (1942); *Andrews v. Andrews*, 188 U.S. 14, 39-42 (1903). See generally Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 *Harv. L. Rev.* 193, 216-17 (1951).

⁴⁰ J. G. Woerner, *American Law of Administration* § 136, at 141-50 (3d ed. 1923).

⁴¹ See ALI Study, *supra* note 12, at 156-61; Moore & Weckstein, *Corporation and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 *Harv. L. Rev.* 1426 (1964).

⁴² The burden of diversity jurisdiction on the federal courts is not a newly discovered phenomenon. As early as 1914, a committee, composed of Charles W. Eliot, Louis D. Brandeis, Moorfield Storey, Adolph J. Rodenbeck, and Roscoe Pound, suggested that diversity jurisdiction was an impediment in the path toward more efficient judicial administration. Preliminary Report on Efficiency in the Administration of Justice 28 (1914). Friendly, *The Historic Basis*, *supra* note 1, at 483 n. 2.

⁴³ In 1900, the population of the United States was a little more than 76 million and there were 70 federal district judges. Slightly more than 26,000 cases were filed. In 1970, the population was 203 million; there were 382 federal district judges and 125,000 filings in the district courts. Rehnquist, *Whither the Courts*, 60 *A.B.A. J.* 787, 788 (1974). In the fiscal year ending with June 30, 1977, the United States district courts had 398 authorized judgeships (373 were filled). There were 432 civil and criminal filings per authorized judgeship—115 more filings than in 1970 when the incoming caseload was 317 per judgeship. Administrative Office of the United States Courts, 1977 Annual Report of the Director (for the twelve month period ending June 30, 1977) at 3 [hereinafter cited as 1977 Annual Report].

than doubled.⁴⁴ No slackening in the pace is in sight.⁴⁵ The result is a situation not capable of reasonable resolution simply by the creation of more judgeships, necessary as they are. Some reduction in intake is imperative.⁴⁶

Facts in the form of dry statistics may best portray the workload of the federal judiciary solely attributable to federal diversity jurisdiction. In the fiscal year ending June 30, 1977, there were 130,567 civil cases filed in the federal district courts of which 31,678, or 24.3 percent were diversity cases.⁴⁷ The total *civil and criminal* cases filed in the federal district courts during the 1977 fiscal year was 172,031.⁴⁸ Diversity cases comprised 18.4 percent of all civil and criminal filings. The great bulk of these diversity cases (approximately 48.9 percent) were tort actions, usually personal injury actions (97 percent of 48.9 percent).⁴⁹ For some reason diversity cases go to full trial more often than nondiversity cases. Approximately 12 percent of them are tried by the court or jury, while only about 7.8 percent of other federal civil cases go to full trial.⁵⁰ In other words, approximately 3,800 of them are tried each year by the federal district courts.⁵¹ Thus, diversity cases accounted for more than 25 percent of all jury trials⁵² and about 65 percent of all civil jury trials.⁵³ And, remarkably, a very large percentage of those tried are appealed, presenting an awesome volume problem to our appellate courts. For example, in 1977 of the some 10,980 civil cases appealed to the circuit courts of appeal, 1,713 were diversity cases.⁵⁴ The flood of cases into the appellate process continues to expand at an increasing rate. During the past ten years the pending workload for each three judge panel increased by 144 percent.⁵⁵

Clearly, through sheer force of numbers these diversity cases tend to preempt already overcrowded dockets and to make it very difficult, if not impossible, for the federal judiciary to give adequate and necessary time to other federal cases that do properly belong in the federal judicial system charged with the administration of justice in basic federal rights areas. Hence, there is presented an independent vital need to achieve a better balance between the state and federal judiciary without the sacrifice of the proper role of the federal courts in our democratic government.

ACTION TO END DIVERSITY JURISDICTION

More than a quarter of a century ago, the late Mr. Justice Jackson stated that "In my judgment the greatest contribution that Congress could make to the orderly administration of justice would be to *abolish* the jurisdiction of the federal courts which is based solely on the ground that litigants are citizens of different states."⁵⁶ At an even earlier date Mr. Justice Frankfurter referred to "the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."⁵⁷

The federal judiciary favors outright abolition of diversity jurisdiction based on state citizenship.⁵⁸ The Judicial Conference in its own wisdom for a number

⁴⁴ In 1962, 61,386 civil filings were recorded; Administrative Office of the United States Courts, 1962 Annual Report of the Director (for the twelve month period ending June 30, 1962) Table C-2, at 196 [hereinafter cited as 1962 Annual Report].

⁴⁵ Friendly, *Averting the Flood by Lessening the Flow*, 59 Cornell L. Rev. 634 (1974).
⁴⁶ Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A. J. 1125 (1973);
 Rehnquist, *Whither the Courts*, 60 A.B.A. J. 787, 790 (1974). See also *id.*

⁴⁷ 1977 Annual Report, *supra* note 42, at Table C-2, A-14. In 1962, 18,359 of the 61,386 civil filings (30%) were grounded in diversity jurisdiction. 1962 Annual Report, *supra* note 42 at Table C-2, at 196. This percentage decreased to 25% (24,109 of 96,173 civil filings) in 1972, and remains close to the 1977 figure of 24.3%.

⁴⁸ 41,464 criminal; 130,567 civil; 1977 Annual Report, *supra* note 32, at 6-7.

⁴⁹ 1977 Annual Report, *supra* note 42, at Table C-2, A-14. (15,493 divided by 31, 678.)

⁵⁰ 1977 Annual Report, *supra* note 32, at Table C-4, A-24 and A-25.

⁵¹ (31,678 x 12%). In 1977, 3,568 civil diversity cases were terminated after reaching the trial stage. *Id.*

⁵² There were 5,886 criminal jury trials in 1977 in districts. 1977 Annual Report, *supra* note 32, at Table D6AD, A-58.

⁵³ (2,277 (civil diversity cases terminated after reaching jury trial)) divided by (3,516 (all civil cases terminated after reaching jury trial)). 1977 Annual Report, *supra* note 32, at Table C-4, A-24, and A-25.

⁵⁴ 1977 Annual Report, *supra* note 32, at 68. The number of civil cases appealed has increased 44.5% since 1971, diversity appeals are up 33.2%.

⁵⁵ 1977 Annual Report, *supra* note 32, at 2. Whereas state and federal prison petitions filed in appeal declined slightly, the major areas of increase in appeals since 1972 are: administrative agency reviews, 48 to 79 per panel and civil proceedings and bankruptcy reviews, 198 to 287 per panel. Administrative Office of the United States Courts, Management Statistics 13 (1977).

⁵⁶ R. Jackson, *The Supreme Court in the American System of Government* 37 (1955).
⁵⁷ *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (concurring opinion). A long time opponent of diversity jurisdiction, he wrote an often cited article in 1928, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 520-30 (1928).

⁵⁸ Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures; Recommendations for Change* (1975).

of years has advocated the repeal of diversity jurisdiction based on state citizenship.⁵⁹ Attorney General Bell, on behalf of the Department of Justice, has stated his conviction that it should be abolished.⁶⁰ Many prestigious organizations and scholars urged its modification if not its outright abolition.⁶¹

State courts would not be overburdened by the elimination of diversity jurisdiction. Each state maintains its own judicial structure; there is only one federal court system. The diversity case distributed among the fifty states, thus, would alleviate the pressure on the single federal funnel.⁶² State courts are charged with the administration of state laws and they deal with their own precedent daily. Returning diversity cases to the source most capable of handling them is both logical and reasonable.

In all aspects of government, throughout the history of our nation there have been numerous and repeated changes in the original laws of our nation to meet the changes occurring in our society. The laws of 1789 were not engraved in stone with intent to make them eternal. In order to adapt to the changes of the past 189 years, all three branches of our government have adopted changes, sometimes novel, laws and policies. Fortunately, the American people can look to their elected representatives, their Congress, to be sensitive to problem areas where change is needed to make those changes of law which are meritorious and in the interest of the people of this nation. The very important diversity jurisdiction problem with its adverse effect on the ability of the federal judicial system to serve the American people has not gone unnoticed or unattended. This Congress is examining in depth the problems of federal court administration.

H.R. 9622 has been introduced in and has passed one house of the current Congress.⁶³ This bill, designed to meet the almost overwhelming problems caused

⁵⁹ The Judicial Conference recommendations are consistent with H.R. 9622 (see note 62 *infra*). Conference Reports, March 1977, at 8, and September 1977, at 52.

⁶⁰ "Even if this historical justification has validity today, it would not apply where suit is brought in the state of which the plaintiff is a citizen." 123 Cong. Rec. H9509 (Sept. 15, 1977).

⁶¹ In his September 10 address delivered to the annual meeting of the judges of the Second Judicial Circuit, Vice President Mondale stated:

The problems of overcrowded dockets, rising legal costs and mounting delays are not just a headache for [Federal] judges. They threaten to close the courtroom door on the very people who need judicial relief the most—the poor and the weak middle income citizens, minorities and the powerless. The procedural logjam clogging our courts excludes millions of citizens for whom justice in the courts is the only hope of overcoming generations of prejudice and neglect.

123 Cong. Rec. S15022, S15023 (Sept. 15, 1977). The American Law Institute has recommended its retention in modified form. Study of the Division of Jurisdiction Between State and Federal Courts 1, 105-08 (Official Draft 1969). Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 Wash. & Lee L. Rev. 185 (1969). Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 235 (1948). Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 329 (1967) (he does not, however, advocate its abolition); see notes 17, 41 *supra* and notes 61-62 *infra*. The opposing view is expressed by Frank, *For Maintaining Diversity Jurisdiction*, 73 Yale L.J. 7 (1963). The organized bar also fought proposals to limit federal jurisdiction. *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 270 (1972). For the position of the American Bar Association, see note 62 *infra*. See note 62 *infra* for reaction of the Missouri Bar.

⁶² At the Judicial Seminar on Administration of Justice at Williamsburg, Va., Jan. 28, 1978, the Chief Justice of the Supreme Court of Minnesota, Robert J. Sheran, who is Chairman of the State Conference of Chief Justices, reported that the Conference on Aug. 2, 1977, passed a resolution in favor of the abolition of diversity jurisdiction, and that the state court system is both capable and willing to take over diversity cases (based on state citizenship rather than alienage). The effect on state courts of the elimination of diversity jurisdiction would be minimal. Burdick, *Diversity Jurisdiction Under American Law Institute Proposals: Its Purposes and Effect on State and Federal Courts*, 48 N.D. L. Rev. 1, 14 (Table 4) (1971).

⁶³ H.R. 9622, 95th Cong., 1st Sess. (1977). The bill was passed by the House on February 23, 1978, and has proceeded to the Senate for consideration. On the same subject, S. 2094 and S. 2389 have been introduced in the Senate. S. 2094 would not abolish diversity jurisdiction completely, but rather would limit its application to cases in which there is complete diversity. S. 2389 is more similar to H.R. 9622 in that it would eliminate diversity jurisdiction completely. Both Senate bills are currently in the Subcommittee on Improvements of Judicial Machinery. For a discussion on a similar bill, S. 2094, 95th Cong., 1st Sess. (1977), see 1977 Cong. & Ad. News, Pamphlet No. 9, Cong. & Ad. Highlights at xlii-xiv. Already, the Senate has passed and the House Committee on the Judiciary has begun to consider two additional bills that would help to reduce congestion in federal courts. One bill would authorize the creation of additional district court and circuit court judgeships (1977 Cong. & Ad. News, Pamphlet No. 2, Cong. & Ad. Highlights at x); the other bill would authorize federal magistrates to hear and decide certain civil and misdemeanor criminal cases (1977 Cong. & Ad. News, Pamphlet No. 7, Cong. & Ad. Highlights at xxii). A recommendation of support of H.R. 9622, Report 104A of the Special Comm. on Coordination of Federal Judicial Improvements, was voted down by the House of Delegates at the Mid-Year Meeting of the American Bar Association in New Orleans, Louisiana, February, 1978. The Missouri Bar Board of Governors, in response to a report on H.R. 9622, approved an action on January 4, 1978, to resist efforts to abolish diversity jurisdiction.

by federal diversity jurisdiction, has as its stated purpose: (1) the abolition of general diversity of citizenship jurisdiction in the district courts, retaining, however, jurisdiction in suits to which aliens are parties; (2) an increase in the jurisdictional amount in controversy requirement for alienage cases from \$10,000 to \$25,000; and (3) the removal of the jurisdictional amount in controversy requirement in federal question cases, except where required by specific legislation. Conforming and technical amendments are made to the venue and removal statutes, the presently required \$10,000 amount in controversy under the Consumer Products Safety Act is specifically retained, and the interpleader statute, 28 U.S.C. § 1335, is also retained. The Act would apply to any civil action commenced on or after the date of enactment. Although the Congress failed to enact legislation to limit diversity jurisdiction in earlier sessions,⁶⁴ the lessons of the past few years have been impressive. If not in this form exactly, some type of relief for the burdened federal courts must soon emerge from Congress.

CONCLUSION

Diversity jurisdiction has served its function in the development of the federal judiciary. At a time when the federal courts had little else to do, diversity jurisdiction provided gainful occupation. As we have seen, those days are gone forever. Whatever justification that existed for its existence certainly has disappeared. The potential of prejudice against non-residents will not justify allowing twenty-four percent of the federal courts' civil actions to be diversity cases. Long ago it was said that Congress should return to the state courts judicial power entrusted to the federal courts "when they find the tribunals of the states established on a good footing."⁶⁵ State courts today stand on solid ground. They are capable of and willing to administer their laws. They are in fact more capable than federal courts since the *Erie* decision which requires federal courts to follow or to anticipate state law. The volume of federal litigation, the complexity and scope of federal rights requiring federal judicial attention and the primary need to address the problems of claimants asserting their federal rights all signal a need to revise our avenues to the federal courts. The time surely has come to limit diversity jurisdiction and leave to the states what is of the state and to the United States courts what is federal.

(3)

BUDGETARY IMPACT OF DIVERSITY CASES

1. ASSUMPTIONS

(a) Legislation will become effective October 1, 1979, and that approximately 30,000 civil filings will be diverted to State Courts in fiscal year 1980.

(b) As of October 1, 1979, there will be approximately 30,000 pending cases that will have to be disposed of by the Federal Courts.

(c) That the disposition of pending caseload will take approximately three years and that full potential savings will not be realized until fiscal year 1983.

2. PROJECTED ANNUAL SAVINGS

Based on an 80:1 ratio of filings to deputy clerks, a savings equivalent to approximately 240 positions will be realized.

(a) Salaries of supporting personnel:

240 positions at JSP7/3-----	\$ 3, 200, 000
Benefits -----	300, 000
	<hr/>
	\$3, 500, 000

(b) Travel and miscellaneous expenses:

240 positions at \$1,600 (recurring expenses)-----	390, 000
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(c) Space and facilities:

200 square feet each @ \$1,700 x 240-----	410,000
200 square feet each at \$1,700 x 240-----	410, 000
7,554 trial days at \$600-----	4, 500, 000

Total annual savings-----	8, 800, 000
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¹ Includes normal lapses.

⁶⁴ Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 Ind. L.J. 347, 353 (1977).

⁶⁵ Warren, *New Light on the History of the Federal Judiciary Act*, *supra* note 12, at 66, quoting James Madison.

3. RECAPITULATION OF SAVINGS BY FISCAL YEAR

Fiscal year	Manpower and expenses	Fees of jurors	Total
1981-----	\$2,150,000	\$2,250,000	\$4,400,000
1982-----	1,433,000	1,500,000	2,933,000
1983-----	717,000	750,000	1,467,000
Total-----	4,300,000	4,500,000	8,800,000

There will be some savings in terms of manpower and juror expenses in fiscal year 1980. These savings have been included in the projected savings for fiscal year 1981.

NOTE: Savings may be offset by increases in Federal Question and other civil and criminal filings.

Elimination of Diversity Cases

Cost savings for: "Fees of Jurors and Land Commissioners":

A. Number of diversity trials (July 1, 1977—June 30, 1978) ----- 1,946

B. Length of jury trials:

(1) 305 trials for one day-----	305
(2) 580 trials for two days-----	1,160
(3) 437 trials for three days-----	1,311
(4) 550 trials for four to nine days; average, six and one-half days -----	3,575
(5) 64 trials for 10 to 19 days; average, 14.5 days-----	928
(6) 10 trials for 20 days and over; average, five trials for 25 days, five trials for 30 days-----	275

Total trials 1,946 and Trial days----- 7,554

C. It is estimated that civil trials cost about \$600 per day----- ×600

Rounded ----- \$4,500,000

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., June 19, 1978.

Mr. MICHAEL REMINGTON,

Counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR MIKE: Judge Frank A. Kaufman of the United States District Court in Maryland prepared the enclosed memorandum for his use in discussing the issue with groups of attorneys and state court judges. He provided a copy to me as a courtesy. I have already delivered a copy to Pam Eldrid, and will be sending copies to every member of the Senate Judiciary Committee next week. I thought Mr. Kastenmeier might want to see this, and—in any event—that you would want a copy for your files.

Sincerely,

WILLIAM JAMES WELLER,
Legislative Liaison Officer.

Enclosure.

U.S. DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, Md., June 14, 1978.

Memorandum re diversity jurisdiction:

The pros and cons on the subject have been widely aired. Stated briefly, those who oppose abolition or curtailment of diversity jurisdiction generally make four points: (1) there are certain diversity cases over which no state court is able to obtain jurisdiction; (2) federal courts provide a better brand of justice; (3) state courts will be overburdened if federal diversity jurisdiction is abolished or curtailed; and (4) out-of-staters are subjected to prejudice in state courts.

There is before the Senate at the present time S. 2389. That bill is identical to H.R. 9622 which recently was passed by the House. That legislation abolishes federal diversity jurisdiction and retains federal alienage jurisdiction with a \$25,000 jurisdictional amount. It also retains and clarifies the present federal interpleader provisions embodied in 28 U.S.C. § 1335. Those interpleader provisions, together with state long-arm statutes, seemingly insure that no diversity case will lack an effective forum.

The suggestion that Federal courts provide a better brand of justice would appear unwarranted under any circumstances. In any event, since *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), all that federal courts do in diversity cases is either to follow or to attempt to divine what the highest state court involved has determined. In many instances, when a federal court has available to it a certification statute, it quite sensibly certifies a controlling and important issue to the highest court of the state and sits back and waits until that state court has spoken.

About 25 percent of the current civil caseload of federal district courts consists of diversity cases. If the criminal caseload is considered, the diversity cases constitute more than 18 percent of the overall caseload. Further, while only about 8 percent of all federal cases (civil and criminal) go to trial, 12 percent of diversity cases are tried. The more than 3000 diversity trials held each year in federal district courts constitute 25 percent of all civil and criminal jury trials and about 68 percent of all civil jury trials. Additionally, about 11 percent of all civil cases appealed to the Circuit Courts of Appeals are diversity based. By contrast, the elimination of federal diversity jurisdiction will increase the civil load of state courts of general jurisdiction by less than 3 percent.

Finally, while there may have been a need for out-of-staters, either as plaintiffs or as defendants, to litigate in federal courts during the early days of our country, there would appear little reason today to fear that an out-of-stater will not receive a fair trial in a state trial court. It has been suggested by certain opponents that some litigants desire to present their cases in federal district courts in order to avoid prejudice which urbanites and other members of non-rural communities are said to encounter if they seek to try their cases in certain rural communities. However, those problems should be handled by each state and should not provide a basis for retention of federal diversity jurisdiction.

There is always resistance to change. There is certainly no reason why an able advocate should not avail himself of any option which may be of aid to his client. But in this day and age, there would appear to be no valid, affirmative reason for retaining federal diversity jurisdiction. On the other hand, there are very important reasons why it should be abolished.

In the first place, true adherence to principles of comity will be furthered if state courts decide matters of state law and federal courts do not try to interpret what state courts have decided or may be expected to decide.

Second, if diversity jurisdiction were abolished, federal courts would no longer have to wrestle with many technical, time-consuming questions concerning whether diversity jurisdiction exists and whether diversity cases have been timely and appropriately removed from state court to federal court. The figurative man from Mars would be literally amazed to find that a federal district judge, members of his staff, and a coterie of lawyers, parties and witnesses devote many hours of time every week in order to determine whether a case has been properly brought in or removed to a federal district court which often lies across the street or around the block from the state court involved.

Third, the danger that litigants represented by attorneys unskilled in federal practice will find themselves barred by limitations because their attorneys have mistakenly believed that diversity jurisdiction exists and have sought erroneously relief in federal court rather than in state court will disappear.

Fourth, federal courts will be able to devote all of their time to federal questions. In recent years, Congress has found it necessary substantially to increase the number of federal questions and to provide federal forums for their litigation. In our highly structured society, with more and more involvement of the federal government apparent on every doorstep, many individuals and small businesses desire the opportunity to have federal forums available to them in which to present their controversies with federal governmental agencies. Additionally, for right or for wrong, this is an age in which more and more Americans desire to assert in the courts their basic rights. Finally, the only way in which federal courts can accommodate the growing number of law suits involving federal rights and at the same time continue to entertain diversity jurisdiction cases is to multiply the number of federal judges and to increase the number of other federal judicial officers such as magistrates. We as lawyers and judges

often criticize the tendency of the executive and even of the legislative branches of our government to grow too large in size and almost inevitably at the same time to develop too much red tape and inefficiency. On the whole, the federal judiciary has functioned well as a small group. There has been and probably will be need to increase it in size but such increases would best be kept to a minimum.

I strongly believe that the time has come for abolition of diversity jurisdiction and urge that the Congress act accordingly.

Sincerely,

FRANK A. KAUFMAN.

(b) By Professor Thomas D. Rowe Jr.

(1)

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ABOLISHING DIVERSITY JURISDICTION: POSITIVE SIDE EFFECTS AND POTENTIAL FOR FURTHER REFORMS

By THOMAS D. ROWE, JR.*

The possibility of abolishing the general diversity jurisdiction of the federal courts has received increasing attention with the passage of an abolition bill by the House of Representatives in 1978. Discussion of abolition has tended to focus on such issues as the importance of reducing federal court caseloads, the appropriateness of transferring state law cases to state courts, and the extent to which prejudice against out-of-staters survives in state courts. Professor Rowe suggests that there would be several little-noticed but significant effects of abolishing diversity jurisdiction. He argues that abolition would eliminate or greatly reduce some of the major difficulties in federal practice and procedure, make possible judicial rationalization of some areas of ancillary and pendent jurisdiction, and facilitate further statutory or rule reforms in the federal courts. The Article concludes that these effects provide important additional support for abolition.

One of the more surprising developments concerning the federal courts in the last Congress was the serious consideration given to abolishing the general diversity of citizenship jurisdiction,¹ a fixture in the federal courts since the Judiciary Act of 1789.² Other authors have canvassed the conventional arguments for and against changes in the diversity jurisdiction,³ sometimes with a repetitiveness that Professor David Currie has likened to "an Orwellian broken record."⁴ I do not propose to rehash, or to try to reevaluate, this debate. The purpose of this Article is instead to survey the federal judicial landscape in the

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My work on this subject has received support from a grant under the Federal Justice Research Program of the Office for Improvements in the Administration of Justice, United States Department of Justice, which I gratefully acknowledge. The views expressed here are my own and do not necessarily represent the position of the Department of Justice.

For their comments on earlier drafts of this Article, I should like to thank Dean Paul Carrington; Professors Walter Dellinger, William Reppy, Lewis Sargentich, and William Van Alstyne; Michael Remington of the staff of the Committee on the Judiciary, United States House of Representatives; and my research assistants, Louis Barash and Michael Jorgensen.

¹ 28 U.S.C. § 1332(a) (1) (1976): "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—(1) citizens of different States * * *." See H.R. 9622, 95th Cong., 2d Sess. § 1(b) (1978), *Hearings on S. 2094, S. 2389 & 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 10* (1978) (striking out subsection (1)) [hereinafter cited as *Senate Hearings*]. This bill was passed by the House of Representatives. 124 Cong. Rec. H1569-70 (daily ed. Feb. 28, 1978).

² 1 Stat. 78 (1789) (current version in scattered sections of 28 U.S.C.).

³ See, e.g., Committee on Revision of the Federal Judicial System, U.S. Dep't of Justice, *The Needs of the Federal Courts 13-15* (1977); H. Friendly, *Federal Jurisdiction: A General View 139-52* (1973); Frank, *For Maintaining Diversity Jurisdiction*, 73 Yale L.J. 7 (1963); Sheran & Isaacman, *State Cases Belong in State Courts*, 12 Creighton L. Rev. 1, 26-69 (1978). For an extensive listing of articles, see C. Wright, *Handbook of the Law of Federal Courts* § 23, at 87-89 nn. 13-21, 23-25 (3d ed. 1976).

⁴ Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. Chi. L. Rev. 1, 5 (1968).

presumed absence of the familiar landmark of general diversity jurisdiction.⁵ Though this inquiry may at first sound like a sterile exercise in the hypothetical, I hope to show that some significant issues of federal court jurisdiction and procedure would appear in a different light were Congress to abolish the general diversity jurisdiction—indeed, that thinking about some of these issues in such a context should influence how the federal courts approach them today. Further, several sorts of problems would come up in federal litigation much less often or not at all, and other nettlesome areas of federal practice would lend themselves more readily than now to reform through statutory or rule revisions. In sum, the existence of the general diversity jurisdiction has pervaded, and I dare say confused, theory and operations in the federal courts to an extent little perceived. The likely workings of a system without diversity, and the opportunities for other desirable changes that would follow, should be not the least of the arguments for abolishing it.

A principal theme of this Article is the pernicious effects of the complete diversity rule of *Strawbridge v. Curtiss*,⁶ which requires that for federal diversity jurisdiction *all* plaintiffs be of different citizenship from *all* defendants. The rule (whatever its original inspiration) might be viewed as a response to concern over intrusion by federal courts in multiparty cases into the usual province of the states. The rule, however, is hypertechnical and a misfocused approach to the jurisdictional problems posed by complex litigation. Moreover, the federal courts have sometimes inappropriately extended it beyond the problems of complex diversity cases to which it arguably responds. And it has impeded thinking about what limits make sense for beyond-original jurisdiction of the federal courts. The virtual or complete disappearance of the rule with the abolition of the general diversity jurisdiction should clear away much of the underbrush surrounding such problems.⁷

Part I of this Article briefly discusses a threshold issue for my analysis—whether Congress, in abolishing diversity jurisdiction, should retain the *Strawbridge* complete diversity rule for a surviving federal alienage jurisdiction. It argues that for abolition to yield the greatest benefit, Congress should specify that “minimal” diversity—when one of *any* two adverse parties is an alien and another a citizen of an American state—shall govern in alienage cases. Part II then discusses a significant effect of abolition: the likely reduction in importance of several major jurisdictional and procedural problems. Such an effect on one category of these problems, a great lessening of the state law determinations mandated by the Rules of Decision Act⁸ and the *Erie* doctrine,⁹ has been amply noted before.¹⁰ But the extensive ramifications of another major effect of abolition—the virtual or total elimination of the complete diversity rule and all its works—merit exploration beyond what they have generally received.

Part III looks at several problems in federal practice, mostly having to do with joinder of claims and parties. It argues that under a regime without general

⁵ I have used the term “general diversity jurisdiction” because there are specific reasons that may be weighty enough to keep some specialized forms of diversity jurisdiction, even if that for actions between citizens of different states generally is abolished. Judge Friendly, for example, argues persuasively that we should keep the present jurisdiction over actions between aliens and citizens, 28 U.S.C. § 1332(a)(2)–(3) (1976), and cases of interpleader involving claimants of diverse citizenship, 28 U.S.C. § 1335 (1976). See H. Friendly, *supra* note 3, at 149–50. Whether some such forms survive is of little significance in considering the consequences of striking the general diversity provision from the Judicial Code, though this Article does try to take such matters into account.

⁶ 7 U.S. (3 Cranch) 267 (1806).

⁷ One obvious response to these criticisms would be overruling *Strawbridge* instead of abolishing diversity jurisdiction, since either would eliminate this set of problems. See Currie, *supra* note 4, at 34. The Supreme Court, however, seems irreversible committed to interpreting the general diversity statute as requiring complete diversity. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373–74 & n. 13, 377 (1978). And since overruling *Strawbridge* by legislation would threaten to increase federal court caseloads considerably, it seems most unlikely that Congress would take that action except in the company of some major caseload-reducing measure such as severe restriction of the general diversity jurisdiction. Furthermore, the existence of diversity jurisdiction itself, even without *Strawbridge*, creates or adds to certain difficulties.

⁸ 28 U.S.C. § 1652 (1976): “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”

⁹ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 72–73 (1938) (state “laws” in Rules of Decision Act include decisional law).

¹⁰ See, e.g., Committee on Revision of the Federal Judicial System, U.S. Dep’t of Justice, *supra* note 3, at 13–15.

diversity jurisdiction, the federal courts should be more inclined than they sometimes are today to reach results hospitable to ancillary jurisdiction. Beyond that, however, thinking about a hypothetical system without diversity indicates that even now courts sometimes overextend concerns rooted in problems unique to the diversity jurisdiction. The effect has been to encumber some federal question cases with restrictions not properly applicable, or which at best should apply only after more analysis than they have generally received. Part IV turns from effects on interpretations of existing statutes and rules to amendments that should or could be made to such procedural provisions. It argues that abolition of diversity would facilitate some significant improvements in federal court procedure, such as provisions for uniform ancillary jurisdiction and nationwide service of process, and would promote a sharper focus on the question of what types of multistate disputes should come within federal jurisdiction.

Arguments against diversity jurisdiction have hitherto emphasized the lack of positive reasons for it, the need for a reduction in federal caseloads and jury trials, and the appropriateness of merging more fully the power to interpret state law with the responsibility of applying it.¹¹ This Article concludes that additional effects of abolition—elimination or reduction of some of the most vexing problems in federal practice, demystified interpretations, and facilitation of reforms—indicate that the federal judicial system would benefit considerably more than has previously been remarked.

I. COMPLETE OR MINIMAL DIVERSITY IN ALIENAGE CASES

Abolition of the general diversity jurisdiction for suits between citizens of different states would raise related questions about the alienage jurisdiction over suits between citizens and aliens.¹² Alienage jurisdiction probably should be retained, since the alienage caseload is small¹³ and at least part of the rationale for the jurisdiction—possible effects on the foreign relations of the United States¹⁴—is independent of the possible reasons for general diversity jurisdiction. But there still would remain the question whether complete or minimal diversity should be the rule for alienage cases.

It seems to be well settled, though perhaps not definitively so, that the *Strawbridge* rule applies to alienage as well as diverse state citizenship cases,¹⁵ which means that either state cocitizens or coalienas as adversaries destroy complete diversity and thus federal alienage jurisdiction.¹⁶ As a result, there is a crazy quilt pattern for cases involving citizens opposing aliens, some of which come within the alienage jurisdiction and some of which do not. If an alien or aliens oppose a citizen or citizens, or if citizens of completely diverse citizenship oppose each other and an alien or aliens are also involved on one side, the federal courts have jurisdiction. But if there are aliens on both sides and citizens on only one,

¹¹ See, e.g., *id.*; H. Friendly, *supra* note 3, at 139–49.

¹² 28 U.S.C. § 1332(a)(2)–(3) (1976):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between. * * *

(2) citizens of a State, and foreign states or citizens thereof:

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties. * * *

¹³ The Annual Reports of the Director of the Administrative Office of the United States Courts do not provide separate figures on alienage and general diversity cases. A very rough idea of their relative incidence can be gleaned from the number of pages that West's United States Code Annotated devotes to headnotes focusing on cases concerning each variety. In the 1978 pocket part covering 28 U.S.C. § 1332, there were 30 pages (44–74) on general diversity matters and four (74–78) on alienage and foreign state cases (the latter arising under 28 U.S.C. §§ 1330(a), 1332(a)(4) (1976)) combined.

¹⁴ See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 108 (1969) [hereinafter cited as ALI Study]:

It is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the insurance that he can have his cases tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it.

¹⁵ See 1 J. Moore, Federal Practice ¶ 0.75[1.–2], at 709.6–7 (2d ed. 1978). The Supreme Court has never squarely decided the issue, though *Strawbridge* itself—a case involving only United States citizens—used the broad language that in a suit under the predecessor of the present diversity and alienage statute, “each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts,” 7 U.S. (3 Cranch) at 267.

¹⁶ See 1 J. Moore, *supra* note 15, ¶ 0.75[1.–2], at 709.6–7. It appears not to have been decided whether the presence of aliens as parties on both sides of a suit also including completely diverse citizen adversaries affects federal jurisdiction. See 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3604, at 610 (1975).

or aliens on only one side but incomplete diversity between citizen adversaries who are also involved, there is no federal alienage or diversity jurisdiction.¹⁷

The *Strawbridge* complete diversity requirement, I suggest, is an egregiously bad rule for alienage cases, and it nefariousness would stand out in even sharper relief after abolition of general diversity. It is a major thesis of this Article that the effects of the rule are pervasive and mischievous. Yet permitting the rule to survive for alienage cases would preserve in miniature the many complex and difficult problems resulting from it. Its survival in only a small category of cases, of course, would mean that it would do less harm than it now does: but, in ways I hope to make clear, existence of a complete diversity requirement in *any* category of cases within federal jurisdiction creates significant obstacles to certain desirable measures affecting federal jurisdiction as a whole. The *Strawbridge* tail, in other words, to a certain extent wags the federal judicial dog: if an alienage jurisdiction with the complete diversity rule survived, the tail would be far smaller but the effect could remain.

Moreover, there is a serious conflict between the effects of the complete diversity rule and the possible effects on United States foreign relations that, in addition to concerns about state court prejudice against outsiders, justify alienage jurisdiction. Under the confusing and arbitrary crazy quilt pattern outlined above the complete diversity rule excludes from federal court some cases that might affect foreign relations just as much as those allowed in. Further, the *Strawbridge* rule gives a citizen plaintiff the ability to manipulate his suit to block an alien defendant from all access to the federal courts, whatever the possible bias against the alien or the foreign relations repercussions, if the plaintiff can find a citizen of his own state who would be a proper codefendant. Thus, if the federal courts do not feel free to overrule *Strawbridge* for a surviving alienage jurisdiction. Congress should do so by authorizing alienage jurisdiction for cases involving minimal diversity.¹⁸

¹⁷ See 28 U.S.C. § 1332(a) (2)-(3) (1976); 1 J. Moore, *supra* note 15, ¶ 0.75[1-2], at 709.6-7.

¹⁸ Congress may overrule *Strawbridge*, since "[i]t is settled that complete diversity is not a constitutional requirement," *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n. 13 (1978). One conceivable problem with such a step would be the possibility of citizens' attempting substitution or joinder of aliens as a maneuver to affect federal jurisdiction, but for reasons discussed p. 973 *infra* that should not be a significant concern.

Retention of federal alienage jurisdiction would, however, raise an additional set of issues concerning the jurisdictional amount requirement, See 28 U.S.C. § 1332(a) (1976). The threshold question would be whether to retain such a requirement at all. Whatever the problems of determining the amount in controversy, see generally 1 J. Moore, *supra* note 15, ¶¶ 0.90-99, and the justifications for the alienage jurisdiction, they do not seem to warrant turning the United States District Courts into small claims courts for any state law case that involves an alien. The 1978 House bill abolishing diversity would have retained the requirement for alienage cases and raised it to \$25,000. See H.R. 9622, 95th Cong., 2d Sess. § 1(a) (1978), *Senate Hearings*, *supra* note 1, at 10.

Adoption of a minimal diversity rule would call for retention of the present case law that sharply restricts aggregation of claims to satisfy the jurisdictional amount requirement, limiting aggregation to a narrowly defined type of "joint" or "common" claims. See generally C. Wright, *supra* note 3, § 36, at 139-40. Any significant broadening of ability to aggregate would often allow a single alien's involvement in a multiparty state law case to bring the case into federal court no matter how small his stake.

Related questions would be whether the claims for or against *all* aliens in a case should be eligible for aggregation on a theory that the concern of the alienage jurisdiction is with the extent to which foreign interests are being affected, and whether the courts should look to the plaintiff's or the defendant's view when a single citizen plaintiff with a total claim exceeding the minimum sued a group including an alien who could not be liable for as much as the minimum. In the interests of simplicity of administration and avoidance of false incentives to join or avoid joining alien parties, the best approach (when no exception allowing aggregation applied) would probably be to require that at least one alien's individual stake by itself be large enough to entitle him to federal jurisdiction.

Either the courts or Congress also would have to consider whether to continue under a minimal diversity approach the present "rule that multiple plaintiff's with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts," *Zahn v. International Paper Co.*, 414 U.S. 291, 294 (1973) (italics added). In other words, when one plaintiff (or, given that alienage cases might have aliens as defendants only, one defendant) has a large enough stake for his claim to be in federal court, may others with smaller claims take part in the same litigation? The answer seems to be that they should be able to, since excluding them would greatly reduce the effectiveness of the minimal diversity rule. Parties formerly excluded by *Strawbridge* could run afoul of a requirement that they present the minimum amount in controversy on their own, thus splitting cases parts of which would be in federal court anyway. There would be an incentive to citizen plaintiffs suing aliens for large sums and wishing to stay in state court to join codefendants and state below-minimum claims against them, to which the aliens might be tempted to respond with an effort at separate-claim removal under 28 U.S.C. § 1441(c) (1976), with all of the problems that section raises, see pp. 979-81 *infra*. Those seeking removal might also argue that the case was one of the few qualifying for aggregation, a difficult determination, see C. Wright, *supra* note 3, § 36, at 139-40, that would be unnecessary if it sufficed that a single alien met the requirement. In multiparty cases, then, satisfaction of the amount in controversy requirement by *one* alien party should allow *all* properly joined parties to stay in federal court or make the case eligible for removal.

II. PROBLEMS REDUCED OR ELIMINATED BY ABOLITION

It has not escaped the attention of those questioning the wisdom of retaining diversity jurisdiction that abolition would mean vastly fewer *Erie* problems of applicability, choice, determination, and application of state law in the federal courts.¹⁹ The federal bench would find itself far less often, in Judge Frank's phrase, playing the role of "ventriloquist's dummy to the courts of some particular state."²⁰ Of course, not all such issues would disappear from the federal courts. State law questions would continue to arise in contexts such as pendent jurisdiction cases²¹ and federal income tax litigation.²² This remainder, nonetheless, would no doubt constitute only a small fraction of the present *Erie* load.

There is another major set of problems, though, whose virtual disappearance might be equally significant but has received very little notice.²³ I refer chiefly to the difficulties of administering the *Strawbridge* complete diversity rule, which would be an incidental casualty of abolishing the general diversity jurisdiction. Although federal judges and practitioners have learned to live, not always comfortably, with the many and often vexing problems that *Strawbridge* creates, many of the most bedeviling areas of federal jurisdiction and procedure owe their complexity to the complete diversity rule. Since it is the focus on citizenship of parties as the basis of subject-matter jurisdiction that underlies these problems, abolition of diversity would transfer none of them to the state courts, which either are courts of general jurisdiction or normally focus on factors other than the parties' citizenships to determine their subject-matter competence. To the extent such issues ceased to arise in the federal courts, then, they would disappear entirely.²⁴

A. Noncollusive Manipulation of Citizenship Status

Once citizenship became irrelevant to a federal court's jurisdiction, litigants would have much less occasion to manipulate and contest, and the courts to decide, who was a citizen of what state.²⁵ Opportunities for manipulation of citizenship status, as by a party's prefiling change of residence, or by joinder or omission of a potential coparty, may enable parties to achieve such questionable aims as putting off trial by forcing the case into a forum where delays are greater,²⁶ or taking advantage of the same local prejudice against which diversity jurisdiction seeks to protect.²⁷ A federal court jurisdiction limited mainly to federal question cases would offer fewer openings for this sort of manipulation.

After abolition state citizenship would remain relevant in federal litigation only in any surviving categories of citizenship-based jurisdiction, such as alienage cases, and for occasional purposes such as determinations on voting rights. Even in alienage cases, there should be less manipulation and litigation over citizenship than in general diversity actions today. A mere change of state citizenship would normally not affect federal jurisdiction, since all that is relevant for alienage jurisdiction, given one side's alienage and the jurisdictional amount in

¹⁹ See, e.g., H. Friendly, *supra* note 3, at 142-43.

²⁰ *Richardson v. Commissioner*, 126 F. 2d 562, 567 (2d Cir. 1942).

²¹ See, e.g., P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 766 (2d ed. 1973).

²² See, e.g., *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967) (reference to state property law for federal tax purposes).

²³ The major exception to this generation is *Currie*, *supra* note 4. This Part draws considerably on Professor Currie's fine analysis, which focused on the consequences of the complete diversity rule mainly as an argument for over-ruling *Strawbridge* within a retained general diversity jurisdiction.

²⁴ The survival of limited citizenship-based jurisdictions, such as alienage, 28 U.S.C. § 1332(a)(2)-(3) (1976), and statutory interpleader, *id.* § 1335, would mean that not *all* problems associated with citizenship of parties would disappear entirely. In alienage jurisdiction cases, in the complete diversity requirement might survive. See generally pp. 966-68 *supra*. Minimal diversity among claimants, however, already suffices for statutory interpleader jurisdiction. *State Farm Fire & Cas. Co. v. Tashire*, 336 U.S. 523, 530-31 (1967).

²⁵ For an example of the kind of painstaking inquiry into state citizenship the federal courts now undertake from time to time, see *Janzen v. Goos*, 302 F. 2d 421 (8th Cir. 1962). See also *Currie* *supra* note 4, at 8-12 (indefiniteness of tests for state citizenship); *id.* at 34-43 (problems in determining citizenship of multistate corporations).

²⁶ See, e.g., C. Wright, *supra* note 3, § 31, at 113.

²⁷ See, e.g., *Currie*, *supra* note 4, at 19.

controversy, is the adversary's citizenship of *any* American state. And the number of prospective litigants who would be willing and able to change *national* citizenship or render themselves stateless in order to affect the availability of a federal forum for a state civil claim would doubtless be so small that the system could afford to let them have their way. Finally, the virtual or complete abandonment of the *Strawbridge* rule would almost entirely eliminate the possibility of destroying jurisdiction once attached by later discovery of error concerning a party's citizenship.²⁸ Nor would there be many times that such steps as realignment or turning up a nondiverse indispensable party²⁹ could destroy federal jurisdiction—thus greatly reducing the incentives to attempt such steps for reasons other than their intrinsic merits.

B. Realignment of Parties

As Professor David Currie has observed, to the extent that the *Strawbridge* complete diversity rule passed from the scene there would virtually disappear "the occasional perplexing problem of realigning parties as plaintiffs or as defendants according to their real interests."³⁰ Nearly always, the reason this issue is contested is to determine whether or not a federal court has jurisdiction based on complete diversity.³¹ At worst, realignment can occur after substantial proceedings on the merits, causing dismissal for want of jurisdiction and wasting the parties' investment in the litigation.³² The elimination of the ability to save or defeat federal jurisdiction by realigning parties would mean that litigants would rarely have the incentive to put much effort into litigating the question.³³ And when the issue *was* worth litigating, the federal courts could decide it free from any distorting influence of concern for its effect on their jurisdiction.³⁴

C. Collusion to Manufacture or Defeat Federal Jurisdiction

Section 1359 of the Judicial Code provides, "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to involve the jurisdiction of such court."³⁵ There is no corresponding provision covering similar efforts to *defeat* invocation of federal jurisdiction, but the federal courts have tended in recent years to guard against such improper or collusive tactics by approaches rather similar to those used under section 1359.³⁶ The problems in this area are very much children of diversity jurisdiction; the making (as by assignment of a claim

²⁸ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 368–69 (1978).

²⁹ See pp. 971–72, 974–79 *infra*. For a listing of the very rare situations (mostly involving unusable sovereigns) in which party joinder in a federal question case might destroy a federal court's jurisdiction, see 3A J. Moore, *supra* note 15, ¶ 19.04[2.–2], at 19–69 n. 12.

³⁰ Currie, *supra* note 4, at 44. See generally *id.* at 44–45.

³¹ See generally 3A J. Moore, *supra* note 15, ¶ 19.03 [1]; 13 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3607.

The present significance of realignment for federal jurisdiction is entirely a result of the complete diversity rule. Unlike complete diversity, minimal diversity cannot be destroyed if it exists, or created if it does not, by mere realignment of parties. Consequently, if *Strawbridge* were no longer to govern in any retained categories of citizenship-based federal jurisdiction, they would rarely engender realignment problems.

³² See 13 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3607, at 644–45 n. 13; cf. C. Wright, *supra* note 3, § 28, at 107 & n. 8 (relevance of "position taken by a party during the litigation" in determining proper alignment).

³³ Parties still would occasionally contest alignment, but generally for reasons unlikely to warrant major battles or to result in appeals, reversals, and retrials. In courtroom appearances, for example, a private party in a multi-party case might prefer being aligned with or against the government.

³⁴ *In re Penn Cent. Sec. Litigation*, 335 F. Supp. 1026 (E.D. Pa. 1971), suggests how jurisdictional concerns might affect courts' treatment of realignment issues. Responding to a new management's effort to align itself with shareholder plaintiffs in a derivative action and wrest control of its prosecution from them, the court went through considerable analysis in granting the realignment and then dropped a footnote: "We specifically limit our decision in this respect to cases where jurisdiction is not based on diversity of citizenship." *Id.* at 1042 n. 7.

³⁵ 28 U.S.C. § 1359 (1976).

³⁶ Compare C. Wright, *supra* note 3, § 31, at 114–18 (cases under 28 U.S.C. § 1359 (1976)), with 14 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3641 (1976) (cases involving attempts to defeat diversity).

or appointment of an administrator) or joining of a party rarely affects the availability of federal jurisdiction not based on parties' citizenships.

The matter requires some further analysis, since collusion issues can arise in two quite distinct contexts, depending on whether the action questioned has to do with the independent jurisdiction of the federal court or its ancillary jurisdiction.³⁷ For the most part, supposedly collusive or improper efforts to affect *independent* (nearly always, original) federal jurisdiction involve appointing a representative or assigning a claim to *make* a party out of someone who would not otherwise be involved, so as to create or destroy complete diversity. By contrast, the same "collusion" label is applied in *ancillary* jurisdiction situations to efforts to procure *joinder* of a party not subject to the federal court's independent jurisdiction but to whom ancillary jurisdiction does extend, and then to take advantage of that party's presence in the litigation to press claims against him despite the lack of an independent basis of jurisdiction over them.³⁸

Problems of collusive or otherwise improper making of parties to create or defeat *independent* federal jurisdiction could survive after abolition only in retained citizenship-based heads of jurisdiction, primarily alienage cases.³⁹ Prospective litigants unable to profit by putting their claims in the hands of citizens of other states might be tempted to reach further for an alien assignee or administrator. Most recent decisions, however, have been hostile to such tactics when seemingly engaged in solely to create or defeat diversity jurisdiction,⁴⁰ and it should be even harder to persuade a court that bringing in an alien, rather than a citizen of another state, was done for independent reasons.

Cases involving actual collusive joinder to take advantage of ancillary jurisdiction has been very few,⁴¹ but the prospect of it has caused considerable judicial concern.⁴² Abolition of diversity jurisdiction would not by itself eliminate temptation to engage in such collusion; parties properly before a federal court as an original matter might collude to bring in someone not subject to original federal jurisdiction. What abolition would eliminate is virtually all reason for concern about such collusion if it took place, since when it is an issue now it matters only because there might be an evasion of the complete diversity requirement. With little or nothing left of the *Strawbridge* rule, the federal courts could focus instead on the desirability of the type of joinder attempted.

³⁷ Defined in note 139 *infra*.

³⁸ What normally fails in such situations is not the initial joinder itself, such as a defendant's impleader of a third party (since the joinder is presumably valid under the rules and within the court's ancillary jurisdiction), but the subsequent effort to add a further claim, such as plaintiff's claim against the third party. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

³⁹ Interpleader should present few if any such problems because of the availability of the device under Fed. R. Civ. P. 22 when there is complete diversity between plaintiff and claimants (even if all claimants are from the same state); under 28 P.S.C. § 1335 (1976) when there is minimal diversity among the claimants; and in state court when all parties are from one state.

⁴⁰ See generally, e.g., *Daniels, Judicial Control of Manufactured Diversity Pursuant to Section 1359*, 9 Rut.-Cam. L.J. 1 (1977).

⁴¹ For an uncommon and engagingly frank instance of such collusion, see *Saalfrank v. O'Daniel*, 390 F. Supp. 45, 53-56 (N.D. Ohio 1975) (collusive conduct not such as to void joinder), *rev'd on other grounds*, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976). Plaintiff's counsel solicited defendant's impleader of plaintiff's cocitizen as a third-party defendant, pointing out to defendant the advantage of possible indemnification and adding that plaintiff would seek to pursue his state claim against the third party once it was impleaded, and even prepared the necessary papers for defendant to take the step.

⁴² "[C]ollusion is the *raison d'être* of the majority position" requiring an independent basis of jurisdiction for a diversity plaintiff's claim against a nondiverse third-party defendant. *Morgan v. Serro Travel Trailer Co.*, 69 F.R.D. 697, 703 (D. Kan. 1975). Out of concern for possible evasion of the complete diversity rule generally, and not just the potential for collusion, the Supreme Court has since adopted the majority position. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

Whatever the justifiability of efforts to guard against collusion, the results have not been fortunate. The possible approaches seem to be *Owen's* adoption of broad prophylactic rules against ancillary jurisdiction in types of situations that might present collusion problems, or trying to deal with collusion in individual cases when it appears. See generally, e.g., 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1444, at 231-32 (1971). The former approach bars ancillary jurisdiction whatever its desirability or the unlikelihood of collusion in a particular case; the latter turns vigilance against collusion into a trap for those informed enough to collude but not so canny as to cover their tracks or to proceed with only tacit accord.

D. "Indispensable," "Necessary," and "Proper" Parties:⁴³ Joinder and Intervention

When there are no difficulties with subject-matter or personal jurisdiction, service of process, or venue, the workings of Federal Rules of Civil Procedure 19 and 20 on joinder of additional parties are reasonably intuitive and straightforward. If an outsider has a relationship to an action making it highly desirable that he be joined, rule 19(a) directs that "the court shall order that he be made a party."⁴⁴ If there is a less close but still significant relation, rule 20(a) allows parties to join as plaintiffs if they so choose or to be joined as defendants if the plaintiff includes them.⁴⁵ In brief, the practice for rule 19(a) parties is to join them and proceed with them; for merely "proper" rule 20(a) parties, it is to leave their joinder up to the initiative of those commencing the action.

Results naturally contrast with the foregoing when there is an obstacle to joinder of a rule 19 or 20 absentee. If he meets the criteria of rule 19(a) and "cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."⁴⁶ In other words, if an "indispensable" party cannot be joined, the court is to dismiss the action: if it is a merely "necessary" party who cannot be joined, the case may proceed without him. A fortiori, there is no requirement to join a merely "proper" party under rule 20(a). The resulting scheme, like the one discussed in the preceding paragraph, is sensible and intuitive: if there is someone you can't join and can't proceed without, you don't proceed; if you can proceed without him, you may.

Present practice, however, yields confusingly disparate results in federal question and diversity cases when the potential obstacle to joinder is lack of independent grounds of subject matter jurisdiction over the claim involving the outsider. In federal question cases, to the extent that extremely limited precedent allows any statement to be made at all, lack of independent jurisdictional grounds does not seem to be an obstacle to joinder of a rule 19(a) absentee;⁴⁷ he may

⁴³ For brevity and simplicity, this Section will use the terms "indispensable," "necessary," and "proper" to express differing relations to a litigation of persons to be joined; different consequences flow from these varying degrees of affiliation. When an outsider has the close relationship to an action defined by Fed. R. Civ. P. 19(a), see note 44 *infra*, cannot be made a party, and is so situated that the court concludes that "in equity and good conscience" the action should not proceed without him, rule 19(b) directs the court to dismiss the action, thus treating the absentee as "indispensable." It is in this sense only that this Section uses the word.

A "necessary" party is simply one who also qualifies for joinder under rule 19(a) but is, if the court must face the issue, one without whom the action *may* proceed under the criteria of rule 19(b), which directs the court to consider:

First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

A merely "proper" party, finally, is one who meets the requirements of Fed. R. Civ. P. 20(a), see note 45 *infra*, without satisfying the more demanding criteria of rule 19(a).

⁴⁴ Fed. R. Civ. P. 19(a):

A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

⁴⁵ Fed. R. Civ. P. 20(a):

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons * * * may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

⁴⁶ Fed. R. Civ. P. 19(b).

⁴⁷ The statements in text may not apply when the reason for lack of subject-matter jurisdiction is failure to satisfy an applicable amount in controversy requirement. The Supreme Court seems to have indicated that such a defect is equally fatal whatever the basis of original federal jurisdiction. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978); *Zahn v. International Paper Co.*, 414 U.S. 291, 302 n. 11 (1973).

be joined as pendent or ancillary to the federal court's jurisdiction over the original claim.⁴⁸ In diversity cases, by contrast, it is clear that lack of complete diversity (and of other bases for independent jurisdiction) does count as an obstacle making rule 19 or 20 joinder impossible. Otherwise, the result would be a litigation that could not have been brought in federal court as an original matter—most commonly, a plaintiff versus one diverse codefendant and another codefendant from plaintiff's home state. Concern with such an easy evasion of *Strawbridge* has prevailed throughout the spectrum of rule 19 and 20 joinder cases:⁴⁹ consequently, when a case involves an "indispensable" party who is unionable for lack of complete diversity it must be dismissed, but if the absentee is merely "necessary" or "proper" the litigation may proceed without him.⁵⁰ If an absentee is so essential to a litigation that it should not go on without him, the thinking goes, it should never have been brought in federal court without him. Yet it could not have been brought there *with* him, since he would have destroyed complete diversity; therefore, it should not be in federal court at all. When an absentee's presence is not so crucial, there is nothing wrong with part of the case being in federal court; the plaintiff has simply made the choice that diversity jurisdiction gives him of trying that part in federal court instead of seeking to bring it all in state court.

Under Federal Rule of Civil Procedure 24(a) (2), the position of an intervenor of right is for present purposes the same as that of a party who should be joined under rule 19(a) (2) (i).⁵¹ Strange as it may initially seem, though, there is a significant variation in practice concerning whether to require an independent basis of federal jurisdiction in diversity cases. Whereas the rule concerning joinder under rule 19(a) (*i.e.*, on the initiative of those already parties) of a merely "necessary" but nondiverse absentee in a diversity suit is that the action can only proceed without him, the vary absentee may *intervene* as of right under rule 24(a) (2) despite lack of complete diversity or any other independent ground of jurisdiction.⁵² An effort at intervention by an "indispensable" but nondiverse party, on the other hand, will result in dismissal of an action that is in federal court solely because of diversity,⁵³ just as if those already parties had raised the issue of the same outsider's joinder. As Professor Moore's treatise gently puts

⁴⁸ *Bowers v. Moreno*, 520 F. 2d 843, 848 (1st Cir. 1975) (upholding "pendent party" jurisdiction over defendants to state law claims in federal question case, in part because "the relief requested would require that many of the defendants be subject to the court's jurisdiction"); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 437 F. Supp. 440, 444-46 (E.D.N.Y. 1977) (state claim defendant refused to intervene in federal question case; court found it a necessary party and upheld "ancillary" jurisdiction); *Jacobs v. United States*, 367 F. Supp. 1275, 1278-79 (D. Ariz. 1973) (upholding "ancillary" jurisdiction); 3A J. Moore, *supra* note 15, ¶ 19.04[2.-2] (indicating that ancillary jurisdiction is not allowed but that pendent jurisdiction may be). It is not yet settled to what extent the rule stated in text for all federal question litigation, leaving it uncertain whether or when a rule 19(a) relationship to a federal question case already before a federal court can overcome, on a "pendent party" or ancillary jurisdiction theory, want of independent jurisdiction over the claim involving the absentee.

The reason for the rarity of cases in this area is that the kind of situation that presents the issue—such as a plaintiff with a federal question claim against one party and a closely related state law claim against another, nondiverse party—is quite unusual. Normally, when there is federal question jurisdiction and a claim against another party that comes within the definitions of rule 19(a), there will be a federal question involved in the other claim as well. See *id.* ¶ 19.04[2.-2], at 19-69 n. 8.

⁴⁹ See Note, *Diversity Requirements in Multi-Party Litigation*, 58 Colum. L. Rev. 548, 549 (1958).

⁵⁰ 3A J. Moore, *supra* note 15, ¶ 19.04[2.-1], at 19-67; *id.* ¶ 19.05[2], at 19-85 to -86; *id.* ¶ 19.19, at 19-352 to -353; 7 C. Wright and A. Miller, *supra* note 42, § 1610, at 94-103 (1972); Kennedy, *Let's Join In: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329, 362 (1969).

⁵¹ Compare Fed. R. Civ. P. 19(a) (2) (i), quoted, note 44 *supra*, with Fed. R. Civ. P. 24(a) (2):

Upon timely application anyone shall be permitted to intervene in an action * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest * * *.

⁵² *E.g.*, *Aman v. Kelbaugh*, 16 Fed. R. Serv. 2d 1314, 1315 (4th Cir. 1973); 7 C. Wright and A. Miller, *supra* note 42, § 1610, at 100-01 (1972); 7A *id.* § 1917, at 603 (1972); Kennedy, *supra* note 50, at 362-63; cf. *Wichita R.R. & Light Co. v. Public Utils. Comm'n*, 260 U.S. 48, 54 (1922):

Jurisdiction once acquired on [the] ground [of diverse citizenship] is not divested by a subsequent change in the citizenship of the parties. . . . Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties.

⁵³ 3B J. Moore, *supra* note 15, ¶ 24.18[3], at 24-771; 7A C. Wright and A. Miller, *supra* note 42, § 1917, at 601-02 (1972).

it, "[b]ecause of these rules intervention practice becomes complicated where jurisdiction was originally found on diversity of citizens."⁵⁴

The distinctions, though uncommonly fine, are at least not pure caprice. Professor Moore's supplement explains that "a finding of indispensability is in effect a finding that under *Strawbridge* the entire controversy is one not properly in the federal court"; by contrast, in the case of the merely "necessary" party the action may continue in federal court and "any rule requiring independent jurisdiction over claims justifying intervention as a matter of right would leave the intervenor exposed to the risks that the right to intervene was created to avoid."⁵⁵ Denial of initial joinder for incomplete diversity may force the entire case into state court, allowing the "necessary" party to defend his interests there. Denial of intervention once a case was in federal court and not subject to dismissal, however, would leave the "necessary" party out in the cold. The "indispensable" party whose presence would destroy complete diversity faces no such problem, since the case must be dismissed however his situation comes to the court's attention.

Whatever the justifications, the resulting system in diversity cases cannot help but strike many as baffling and perverse. There is the obvious anomaly in the availability of ancillary jurisdiction for nondiverse, intervening "necessary" parties but not for the same persons if those initiating or already in action seek to join them as an original matter or under rule 19.⁵⁶ There is a further disparity in the treatment of intervention cases involving incomplete diversity as one proceeds down the scale from "indispensable" through "necessary" to merely "proper" parties. With the first, not only must intervention be denied but the case must be dismissed. With the second, the litigation may proceed with intervention allowed. And with the third, there can be no intervention without an independent basis of jurisdiction, though the action may proceed without the absentee. In other words, if you can't proceed without the unjoinable "indispensable" intervenor, you don't (and, since he would destroy complete diversity, the action must be dismissed); but if you *can* proceed without a rule 24(a) (2) "necessary" intervenor you don't do so—you proceed *with* him, violation of the *Strawbridge* rule notwithstanding.⁵⁷ There thus arises an odd incentive for a federal court approaching determinations of "indispensability" of intervenors in diversity cases: if the court regards it as especially desirable for the litigation to proceed before it with the prospective intervenor joined, its justification apparently must be that it doesn't really need to have him!⁵⁸

The effect of abolition of the general diversity jurisdiction on the problems in this area would be at the very least, a greatly reduced incidence of the complicated situations related to the complete diversity rule. The anomalous distinction between "necessary" party joinder and intervention of right would disappear, ending any need for concern that an original party had colluded with the prospective intervenor to secure joinder that the party could not have effected as an original matter.⁵⁹ There would cease to exist the bewildering three-tier structure in intervention cases, eliminating the need for many fine distinctions between "indispensable" and "necessary" status; in addition to being less frequent, that decision when needed could be made without the distorting incentives

⁵⁴ 3B J. Moore, *supra* note 15, ¶ 24.18[3], at 24-771.

⁵⁵ *Id.* at 96 n.6a (2d ed. Supp. 1978-79).

⁵⁶ See 7A C. Wright and A. Miller, *supra* note 42, § 1917, at 603-04 (1972); Kennedy, *supra* note 50, at 362-63.

⁵⁷ For comment on this disparity between intervention by "indispensable" and "necessary" parties in diversity cases, see 7 C. Wright and A. Miller, *supra* note 42, § 1610, at 98-101 (1972); 7A *id.* § 1917, at 601-02 (1972).

⁵⁸ See 3B J. Moore, *supra* note 15, ¶ 24.18[3], at 96 n.6a (2d ed. Supp. 1978-79) ("the more desirable the presence of the nondiverse party, the more inducement to hold that he is not indispensable").

The emphasis in the 1966 revision of rule 19 on practical concerns, such as "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Fed. R. Civ. P. 19(b), reduces the conceptual difficulty in defining as merely "necessary" the absentee whose presence is highly desirable. See generally *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). In other words, the practical criteria of the rule make it appropriate in some circumstances to conclude that a party who seems intuitively "dispensable" is not so for purposes of the rule, which uses the word as a conclusory term of art. Still, it cannot help but seem strange for a court to strain to label a party *not* essential to the case before it so as to be able to let him intervene.

⁵⁹ Cf. Fraser, *Ancillary Jurisdiction of Federal Courts of Persons Whose Interest May Be Impaired If Not Joined*, 62 F.R.D. 483, 486 (1974) (nothing incentive for collusion due to disparity between intervention and joinder practices).

sometimes present in current practice. In sum, joinder and intervention practice would be greatly simplified, with far fewer deviations from the basic pattern outlined at the beginning of this section.

E. Removal of "Separate and Independent" Claims

Cases involving incomplete diversity are the main breeding ground for litigation under the troublesome section 1441(c) of the Judicial Code, which provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.⁶⁰

This statute aims at preventing the defeat of removal otherwise available under the general removal provisions, sections 1441(a)-(b), by addition of a claim or party in state court that causes the case as a whole not to fall within original federal jurisdiction.

Attempts to use the statute arise principally in incomplete diversity cases in state court in which the diverse defendants want to remove, seeking to persuade the federal court that the claims against them are "separate and independent" from those against their codefendants.⁶¹ The exact nature of the problem with separate-claim removal efforts does not seem pertinent here, since it has to do with the definition of "a separate and independent claim or cause of action"⁶² It should suffice to echo a federal district court that "the field luxuriates in a riotous uncertainty"⁶³ and to point out that it is mainly the *Strawbridge* requirement that forces litigants to attempt separate-claim removal (Under a minimal diversity requirement, a case involving incomplete diversity would normally come within the general removal provisions.⁶⁴

Abolition of the general diversity jurisdiction would eliminate nearly all such cases at a single stroke, thus disposing of most of the applications and the difficulties of the separate claim removal provision. In cases involving only Americans, whatever their state citizenships, absent a federal question there would normally be no possibility of any original or removal jurisdiction in whole or in part. In cases including claims within the alienage jurisdiction, if there were judicial or legislative overruling of *Strawbridge* the involvement of an alien would normally mean that the entire case could have been brought in federal district court, making it eligible for removal under the general removal provisions. If the *Strawbridge* rule survived for a retained alienage jurisdiction, so would the difficulties of the present system,⁶⁵ but on a much smaller scale. Use of the section in federal question cases would probably not be common, but when used it should normally be effective and free from these difficulties.⁶⁶ Abolition of diversity, then, would largely eliminate the need for a separate-claim removal statute, but for the small remaining number of cases to which it would apply, it should generally work quite well.

⁶⁰ 28 U.S.C. § 1441(c) (1976).

⁶¹ The other main issues under the separate-claim removal statute, which are perhaps more discussed by commentators than faced by courts, concern its application in federal question cases. See 1A J. Moore, *supra* note 15, ¶ 0.163[31]; *id.* ¶ 0.163[4-5], at 270-71; 14 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3724, at 648-50 (1976).

⁶² For discussion of the difficulties in applying the provision, see, e.g., Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 Minn. L. Rev. 1, 13-19 (1961).

⁶³ *Harper v. Sonnabend*, 182 F. Supp. 594, 595 (S.D.N.Y. 1960).

⁶⁴ See *Currie*, *supra* note 4, at 22.

⁶⁵ The separate-claim removal section applies to aliens in the same ways it applies to citizens. See 1A J. Moore, *supra* note 15, ¶ 0.75[1-1], at 709.3.

⁶⁶ If the definition of a "separate and independent" claim picks up where that of a "pendent" claim, see *UMW v. Gibbs*, 383 U.S. 715, 725 (1966), leaves off, so that there is no gap in which a case may come under neither the general nor the separate-claim removal provision, these two provisions will normally work together to allow removal of any case involving a removable federal question claim and a state law claim against the same defendant, be the claims related or not. Any case not coming within § 1441(c) would be entirely within a federal court's original jurisdiction and thus removable under § 1441(a)-(b). There is some agreement that the separate claim removal statute should be so interpreted. See 1A J. Moore, *supra* note 15, ¶ 0.163[4-5], at 270-71; 14 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3724, at 648-49 (1976). If it is, a court need not be concerned with the difficulties of deciding whether the claims qualify as separate and independent. See *Cohen*, *supra* note 62, at 31. The separate-claim provision still serves a useful function in this situation, eliminating the temptation for a plaintiff to try to block removal by joining an unrelated, nonremovable state claim against a defendant he is also suing in state court on an otherwise removable federal claim.

F. Conclusions

The foregoing discussion indicates that abolishing the general diversity jurisdiction would have quite significant but previously little-noticed effects—the elimination of much purely procedural litigation and the clarification, through the total or virtual disappearance of some of their more confounding aspects, of a few of the most obscure areas of federal practice. It would be cause or some regret, to be sure, that lore dearly learned and often ingeniously used should become outmoded and irrelevant at a single stroke. Writing off investments of intellectual capital can be painful, but most would now agree that we are better off, not worse, for having gotten rid of the likes of the distinction between general and local law under *Swift v. Tyson*,⁶⁷ the intricacies of three-judge court practice,⁶⁸ and the determination of the jurisdictional amount in controversy in general federal question suits against the United States Government and its personnel.⁶⁹ The simplification resulting from elimination of the general diversity jurisdiction can only count in favor of abolition.

It is fair to ask, of course, whether the unavailability of general diversity jurisdiction would entail unacceptable costs. There is always the fundamental and probably unanswerable⁷⁰ question whether the persistence of local bias is great enough to justify the retention of a choice between federal and state forums, an issue it is not this Article's purpose to address. There are, however, two other possible problems that warrant discussion here. First, might abolishing diversity jurisdiction do away in some cases not merely with a choice of forum but with any forum at all? In the vast majority of cases coming within the general diversity jurisdiction, there is no basis for such concern; federal jurisdiction is wholly concurrent with that of state courts as to both parties and subject matter. Indeed, the federal rules on service of process are such that it should be quite rare for the reach of a federal diversity court's process to exceed that of a court of the same state.⁷¹ For the main situation in which state process might be incurably inadequate, multistate interpleader, there is a special federal jurisdiction⁷² with nationwide process.⁷³ Only in some fairly unusual situations, such as when a party has a state law claim against the United States within exclusive federal jurisdiction and also has related state claims against private defendants from whom he is of completely diverse citizenship,⁷⁴ does the general diversity jurisdiction contribute to making the federal court a forum that no state can offer for an entire dispute.⁷⁵ Far more often, though, diversity jurisdiction today splits cases rather than consolidating them, as completely diverse litigants exercise their right to go into federal court while leaving those ineligible

⁶⁷ 41 U.S. (16 Pet.) 1 (1842), overruled, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); see T. Arnold & F. James, Cases and Materials on Trials, Judgments and Appeals 202-03 (1936); F. Frankfurter & H. Shulman, Cases and Other Authorities on Federal Jurisdiction and Procedure 185-210 (rev. ed. 1937).

⁶⁸ See Act of June 25, 1948, ch. 646, 62 Stat. 968 (repealed 1976). See generally *Currie, The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

⁶⁹ See Act of June 25, 1948, ch. 646, 62 Stat. 930 (amended version at 28 U.S.C. § 1331(a) (1976)); 1 J. Moore, *supra* note 15, ¶ 0.96[3.-1], at 940-43 (conflicting approaches of lower federal courts).

⁷⁰ See *Currie, supra* note 4, at 5 n. 19 (noting the difficulty of ascertaining existence of local bias in state courts).

⁷¹ The general authority of a federal court to serve process out of state is derived from the long-arm statute or rule of the state in which the federal court sits. Fed. R. Civ. P. 4(e). Provisions for nationwide service are tied to specific types of actions and jurisdictions, general diversity not among them. See note 177 *infra*. One might expect federal process to be superior in cases falling under the 100-mile "bulge" provision of Fed. R. Civ. P. 4(f), and for international service. The general availability of state long-arm provisions, however, should mean that the "bulge" authority would rarely bring into federal court a party whom a state court could not reach; and it is not at all uncommon for states to have provisions for service in foreign countries. See note 84 *infra*.

⁷² 28 U.S.C. § 1335 (1976). The 1978 House abolition bill would have left federal statutory interpleader intact. See H.R. 9622, 95th Cong., 2d Sess. § 3(b) (1978), *Senate Hearings, supra* note 1, at 11-12.

⁷³ 28 U.S.C. § 2261 (1976).

⁷⁴ See *Jacobs v. United States*, 367 F. Supp. 1275 (D. Ariz. 1973).

Later Sections of this Article suggest that abolishing diversity would facilitate broadening of definitions of ancillary jurisdiction in the categories of original federal jurisdiction that would remain. See pp. 995-99, 1000-04 *infra*. Such a development would retain for principled reasons, and not just out of sheer coincidence, the federal courts' ability to provide a single forum for the kind of case described in the text.

⁷⁵ Though there may be constitutional obstacles to the exercise of state court jurisdiction over class actions involving scattered parties, see Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718 (1979), federal diversity jurisdiction rarely can provide a forum for such disputes because of restrictive Supreme Court interpretations of the amount in controversy requirement, see Becker, *The Class Action Conflict: A 1976 Report*, 75 F.R.D. 167, 168 (1977).

for federal jurisdiction in state forums. The unification in state court of many cases that diversity now splits between federal and state tribunals should more than offset the infrequent situations in which abolition would force litigation into two forums instead of one.

However, it might be little consolation to a party relegated to a state court that he still had a forum, if that forum were tangibly inferior to the federal court he could no longer use. The possible general superiority of federal trial court justice has been a secondary argument in discussion of abolishing diversity,⁷⁶ and I will not try to add to that debate here. Perhaps more important, state courts often do not yet come close to matching several interstate and international devices that are well developed in the federal courts,⁷⁷ such as international service of process,⁷⁸ subpoenas,⁷⁹ and discovery,⁸⁰ and interstate subpoenas,⁸¹ discovery,⁸² and enforcement of judgments.⁸³ To the extent that such facilities are not available in state courts, litigants no longer able to take advantage of federal jurisdiction would be handicapped. These are not, however, tools the state courts cannot offer; some exist already in several states,⁸⁴ and through uniform acts⁸⁵ or federal legislation in aid of state court proceedings⁸⁶ the state courts could approach the same level of interstate and international capability that the federal courts possess now.

Simply retaining diversity jurisdiction, however, would not be a fully adequate alternative to encouraging such state efforts, since there are various reasons why cases can fail to come within federal diversity jurisdiction—no diversity, incomplete diversity, immeasurability or inadequacy of amount in controversy. Running afoul of one of these obstacles bears no necessary relation to legitimate need for interstate and international facilities, and there is simply no reason why such facilities should be unavailable to those who cannot choose a federal forum. Until the states added needed interstate and international devices to their courts' procedural tools, abolition of diversity would result in some hardship for those who could formerly have qualified for federal jurisdiction. The eventual result, however, should be accelerated improvement in state procedures,⁸⁷ after which those litigants who would have chosen federal court should not be tangibly worse off while those who could not have done so would be measurably better served.

III. EFFECTS ON DECISIONAL LAW

Federal courts regularly find before them, by original complaint or by later attempt at addition of claims or parties, claims between citizens of the same state. When there is no independent basis of subject matter jurisdiction over such a claim, diversity requirements raise the possibility that it might be improper for a federal court to hear the claim or even, should the claim be one of many in the litigation, that the case as a whole should be dismissed. In facing these problems, courts and commentators have not always considered whether the principles they evolve should apply in all federal court litigation or should

⁷⁶ See, e.g., Frank, *supra* note 3, at 10-11.

⁷⁷ See Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 328 (1977).

⁷⁸ Fed. R. Civ. P. 4(i).

⁷⁹ 28 U.S.C. § 1783 (1976); Fed. R. Civ. P. 28(b), 45(e) (2).

⁸⁰ 28 U.S.C. § 1781 (1976) (letters rogatory).

⁸¹ Fed. R. Civ. P. 45.

⁸² Fed. R. Civ. P. 28(a), 30(d), 37(b) (1), 45(d).

⁸³ 28 U.S.C. § 1963 (1976).

⁸⁴ For service of process in foreign countries, see, e.g., Cal. Civ. Proc. Code § 413.10(c) (West 1973); Md. Sts. & Jud. Proc. Code Ann. § 6-304 (1974); N.Y. Civ. Prac. Law § 313 (McKinney 1970); N.C.R. Civ. P. 4(j) (9)(d); Tex. Rev. Civ. Stat. Ann. § 2092(7) (Vernon 1964).

⁸⁵ For taking discovery in other states or foreign countries, see, e.g., Cal. Civ. Proc. Code § 2024 (West Supp. 1979); Md. R. Proc. 403, §§ b-c; Nev. Rev. Stat. §§ 53.020, -.040 (1973); N.M.R. Civ. P. 28(a)-(b); N.Y. Civ. Prac. Law § 3113 (a) (2)-(3) (McKinney 1970); N.C.R. Civ. P. 28(a)-(b).

⁸⁶ For taking discovery for use in other states, see, e.g., Cal. Civ. Proc. Code § 2023 (West Supp. 1979); Md. Cts. & Jud. Proc. Code Ann. § 9-401 (Supp. 1978); Nev. Rev. Stat. § 53.060 (1973); N.M. Stat. Ann. § 38-8-1 (1978); N.Y. Civ. Prac. Law § 3102(e) (McKinney 1970); N.C.R. Civ. P. 28(d); Tex. Rev. Civ. Stat. Ann. § 3769a (Vernon Supp. 1978-79).

⁸⁷ See, e.g., Uniform Enforcement of Foreign Judgments Act. Twenty-two states have adopted some version of the Act. See 13 Uniform Laws Annotated 2, 6 (Supp. 1979).

⁸⁸ See, e.g., 28 U.S.C. § 1781 (1976) (letters rogatory).

⁸⁹ See H.R. Rep. No. 95-893, 95th Cong., 2d Sess. 4, 2 (1978); cf. Note, *supra* note 75, at 718 n. 5 ("The impulse toward modernization [of state class action procedures] is due at least in part to the barriers [Supreme Court] cases raised to class actions in federal courts.").

be confined to the specific contexts in which they arose, such as diversity cases generally, incomplete diversity situations, or instances of possible collusion to create or defeat federal jurisdiction.⁸⁸ Worse, courts in federal question cases have sometimes relied uncritically on general language from diversity actions, frustrating efforts at joinder on the basis of rules developed in diversity litigation to deal with *Strawbridge* problems.⁸⁹ In effect, the existence of a head of federal court jurisdiction other than the one used to bring a case before the court constricts the court's jurisdiction in that case. It is hard to conceive of a court's proceeding in this manner if there were no general diversity jurisdiction.

The foregoing is not to suggest that there is a single strand of confusion running through the cases, or any uniform pattern of narrow jurisdiction interpretations based on general applications of *Strawbridge*-inspired rules. If anything, as Professor Currie has noted, there has been a tendency to resolve the "collision * * * between the complete-diversity policy of *Strawbridge v. Curtiss* and the liberal joinder philosophy of the Civil Rules * * * in favor of judicial economy at the expense of *Strawbridge*."⁹⁰ The restrictive cases and their extension to nondiversity situations may be exceptions to this tendency, but as this Part will show they are not isolated or insignificant ones.⁹¹ This Part will consider three joinder problems related to *Strawbridge*—claims between plaintiffs and third-party defendants, ancillary jurisdiction over permissive intervention, and pendent parties—and sum up with a discussion of possible judicial movement towards greater uniformity in ancillary jurisdiction matters.

A. Claims Between Plaintiffs and Third-Party Defendants

In *Owen Equipment & Erection So. v. Kroger*⁹² the Supreme Court recently held, settling a conflict in the courts of appeals,⁹³ that in a diversity case a plaintiff may not "assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim."⁹⁴ The Court's holding, however, applies only to diversity cases,⁹⁵ leaving it unclear whether the same rule applies to cases within other heads of federal jurisdiction. That problem lends itself to analysis in the context of a presumed abolition of general diversity jurisdiction, and that analysis in turn provides insights applicable to practice under existing federal jurisdiction.

Rule 14(a) of the Federal Rules of Civil Procedure provides for impleader by a defendant of a person "who is or may be liable to him for all or part of the plaintiff's claim against him." The rules goes on to authorize both plaintiff and third-party defendant to assert against each other "any claim * * * arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim" against the original defendant. Efforts to press claims within the terms of the rule can obviously raise jurisdictional issues, as when a defendant in a diversity case impleads someone from his own state as a third-party defendant on a state law claim. It is well settled in the lower federal courts that there is no requirement of an independent basis of jurisdiction over such a claim.⁹⁶ If the same

⁸⁸ See, e.g., *Danner v. Anskis*, 256 F. 2d 123, 124 (3d Cir. 1958) (despite broad language of Fed. R. Civ. P. 13(g), plaintiff may not state cross-claim against coplaintiff, absent related counterclaim against cross claimant, since otherwise rule might extend "jurisdiction of the district court to controversies not within the federal judicial power").

⁸⁹ See, e.g., *Palumbo v. Western Md. Ry.*, 271 F. Supp. 361, 362-63 (D. Md. 1967) (federal question case; absent independent grounds of jurisdiction, plaintiff may not assert claim against properly impleaded but nondiverse third-party defendant) (following *Friend v. Middle Atlantic Transp. Co.*, 153 F. 2d 778 (2d Cir.) (diversity under former provision for direct impleader of third party liable to plaintiff), cert. denied, 328 U.S. 865 (1946)).

⁹⁰ Currie, *supra* note 4, at 32-33.

⁹¹ Nor is there even uniformity within the categories in which these exceptions appear; the courts sometimes differ widely in their approaches to a single variety of joinder. See, e.g., 3 J. Moore, *supra* note 15, ¶ 14.27[1], at 14-573 nn. 33-34 (2d ed. 1978 & Supp. 1978-79) (conflicting decisions on ancillary jurisdiction over plaintiffs' claims against third-party defendants in federal question cases).

⁹² 437 U.S. 365 (1978).

⁹³ See *id.* at 367 n. 1.

⁹⁴ *Id.* at 367.

⁹⁵ In stating the issue at the beginning of its opinion, the Court included the qualifying clause, "[i]n an action in which federal jurisdiction is based on diversity of citizenship." *Id.* Its reasoning, moreover, stressed the complete diversity rule of *Strawbridge* and the case of evading that rule by invoking ancillary jurisdiction if it were available. See *id.* at 373-75.

⁹⁶ See, e.g., 3 J. Moore, *supra* note 15, ¶ 14.26; 6 C. Wright and A. Miller, *supra* note 42, § 1444, at 223-28. The refusal to require an independent jurisdictional basis prevails regardless of whether the original claim is in federal court under federal question or diversity jurisdiction, and regardless of whether the third-party defendant is a cocitizen of either original party. See *id.* at 223-25.

approach were to govern claims between the plaintiff and a cocitizen third-party defendant, though, both could bring before the federal court further matters not within its original jurisdiction.

It has become increasingly accepted that when a third-party defendant asserts a claim against the plaintiff that satisfies the requirements of rule 14(a), there need be no independent jurisdictional basis, whatever the original ground of jurisdiction;⁹⁷ but when plaintiff seeks to claim directly against the third-party defendant, the courts have been divided. When original jurisdiction rests on diversity, the Supreme Court's *Owen Equipment* decision has settled that there must be an independent jurisdictional ground. The Court's opinion, like many previous lower court cases on the point, mostly or entirely confined its reasoning and language to the diversity context;⁹⁸ other lower court opinions, if not explicitly purporting to extend their holdings to federal question cases, had spoken in general terms.⁹⁹ When the issue has arisen in federal question cases, the courts have been split.¹⁰⁰ One decision, *Mickelic v. United States Postal Service*,¹⁰¹ even required an independent jurisdictional basis for the plaintiffs' claim against the third-party defendants when the original claim was within the *exclusive* jurisdiction of the federal courts.

This last result is hard to defend, even under the existing jurisdictional statutes. Plaintiffs wanted to state against third-party defendants already in the litigation claims incontrovertibly arising out of the same occurrence sued on in plaintiffs' complaint. Since there was no other forum available for the original claim, requiring an independent basis of jurisdiction would force plaintiffs either to litigate in separate court systems matters naturally and economically triable together,¹⁰² or to forgo one or another possibly valid claim.¹⁰³

In *Mickelic* and some other cases,¹⁰⁴ lack of diversity has been a factor contributing to the courts' insistence on an independent basis for federal jurisdiction. Yet if there were no general diversity jurisdiction, absence of "diversity" would be plainly irrelevant to the decision whether to require independent jurisdictional grounds. The same, I suggest, should hold true today. Diversity jurisdiction and the *Strawbridge* rule do not forbid *all* litigation in federal court whenever there is incomplete or no diversity;¹⁰⁵ they forbid such litigation only in *diversity cases*

⁹⁷ See, e.g., *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F. 2d 709 (5th Cir. 1970), followed in *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F. 2d 763, 772 (7th Cir. 1973) (alternative holding), cert. denied, 414 U.S. 1146 (1974); 3 J. Moore, *supra* note 15, ¶ 14.27[2]; 6 C. Wright and A. Miller, *supra* note 42, § 1444, at 232-34. *Contra*, e.g., *James King & Son, Inc. v. Indemnity Ins. Co. of N. America*, 178 F. Supp. 146, 148 (S.D.N.Y. 1959).

⁹⁸ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978); *Favor v. Teraco, Inc.*, 546 F. 2d 636, 638-39, 643 (5th Cir. 1977); *Saalfrank v. O'Daniel*, 533 F. 2d 325, 328-29 (6th Cir.), cert. denied, 429 U.S. 922 (1976). *Favor*, however, at one point cited diversity and federal question cases indiscriminately in support of its statement that the then majority rule required "an independent jurisdictional basis for a plaintiff's claim against a third-party defendant," 546 F. 2d at 639 & n. 7 (footnote omitted).

⁹⁹ See, e.g., *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F. 2d 890, 893-94 (4th Cir. 1972). However, the *Kenrose* opinion included some reasoning that applied only in diversity litigation.

The term "federal question" cases as used here includes state law cases within federal jurisdiction because the United States is a party, see 28 U.S.C. §§ 1345-46 (1976), since such jurisdiction rests on federal involvement and is not subject to the complete diversity rule. For jurisdictional purposes, therefore, such cases are in most respects like those arising under federal law.

¹⁰⁰ No independent, jurisdictional ground was required in, e.g., *Florida E. Coast Ry. v. United States*, 519 F. 2d 1184, 1193-97 (5th Cir. 1975); *Davis v. United States*, 350 F. Supp. 206 (E.D. Mich. 1972). Independent grounds were required in, e.g., *Schrab v. Erie L.R.R.*, 303 F. Supp. 1398 (W.D. Pa. 1969); *Palumbo v. Western Md. Ry.*, 271 F. Supp. 361 (D. Md. 1967).

¹⁰¹ 367 F. Supp. 1036 (W.D. Pa. 1973) (suit under Federal Tort Claims Act, over which federal courts have exclusive jurisdiction pursuant to 28 U.S.C. § 1346(b) (1976)).

¹⁰² See *Davis v. United States*, 350 F. Supp. 206, 208 (E.D. Mich. 1972); 3 J. Moore, *supra* note 15, ¶ 14.27[1], at 14-573 n. 33.

¹⁰³ The argument that plaintiffs, if allowed to proceed with the entire matter in federal court, would be doing indirectly what they could not have done directly (by suing both parties as an original matter), see, e.g., *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F. 2d 890, 893 (4th Cir. 1972), proves too much: it is an argument against all ancillary jurisdiction. See Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims*, 76 F.R.D. 525, 543 (1978); *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57, 245 (1978). Furthermore, since plaintiffs in such cases as *Mickelic* have nowhere else to go with their federal claims except federal court, the incentives for and likelihood of collusion seem minimal.

¹⁰⁴ See n. 989, *infra*.

¹⁰⁵ As Chief Justice Marshall pointed out in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821), in federal question cases the federal courts' "jurisdiction depends on the character of the cause, whoever may be the parties"; in diversity cases, it "depends * * * on the character of the parties."

(and then only partially, given some tolerated circumventions). Diversity requirements should have no force to reach out and destroy or prevent federal jurisdiction except when the original jurisdiction is founded upon diversity itself. Accordingly, under the doctrine of pendent jurisdiction it seems to be accepted that common state citizenship of plaintiff and defendant is no argument against the exercise of federal jurisdiction over a claim that could not have been brought in federal court as an original matter, when that claim is between adversaries already properly in court in a federal question case and is sufficiently related to their federal question dispute. Diversity of the parties could provide an independent basis of jurisdiction; lack of diversity, like absence of a federal question or failure to satisfy an amount in controversy requirement, simply means that the court must face the question whether the state claim satisfies the criteria for pendent jurisdiction.¹⁰⁶

It follows that lack of diversity is no reason to impose a requirement of an independent jurisdictional basis for adding claims between parties already properly in federal court in federal question litigation. Yet that is precisely how some courts have regarded it.¹⁰⁷ The *Mickelic* opinion, for example, in support of its requirement of independent jurisdictional grounds quotes at length language on the effects of lack of diversity, even to the extent of its destroying a federal court's jurisdiction when a plaintiff asserts a claim against a cocitizen third-party defendant.¹⁰⁸ This overextension of the influence of *Strawbridge* is only a rather extreme example of the infection of occasional federal question cases by diversity concerns. Such reasoning allows the very existence of an additional but uninvolved head of jurisdiction to lessen the scope of the federal court's jurisdiction in the case before it. What the analysis of this Article suggests is, instead, that what courts do in federal question cases with respect to requiring an independent basis of jurisdiction should be the same whether the general diversity jurisdiction exists or not.

Properly viewed, the only significance of a lack of diversity when a party seeks to add a claim in a federal question case is that it means one possible independent ground of jurisdiction is wanting. When other such grounds are wanting as well, the court must face the question whether it should require an independent basis of jurisdiction; the presence or absence of diversity should be irrelevant to that decision. The court must instead consider to what extent entertaining claims without independent jurisdictional grounds is constitutional, authorized or permitted by statute, and justified by factors of relatedness and economy.

B. Permissive Intervention and the Requirement of an Independent Basis for Federal Jurisdiction

It is well settled that no independent basis for federal jurisdiction is necessary in cases of intervention of right under Federal Rule of Civil Procedure 24(a),¹⁰⁹ even if the intervenor could not have been an original party because his presence would have destroyed complete diversity.¹¹⁰ Indeed, since the intervention is of right, the federal courts lack the discretion they have in connection with several other joinder devices to decline to exercise their ancillary jurisdiction.

¹⁰⁶ Citizenship considerations are absent from discussions of ordinary pendent jurisdiction, and they are simply irrelevant to the test for pendent jurisdiction the Supreme Court has articulated. In the leading case, *UMW v. Gibbs*, 383 U.S. 715 (1966), the Court noted the absence of diversity jurisdiction only in passing as a preliminary matter, *see id.* at 722, and established criteria for pendent jurisdiction focusing on "the relationship between [the federal] claim and the state claim," *id.* at 725. *See generally, e.g.*, 13 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3567, at 439-56.

¹⁰⁷ *See also, e.g., Palumbo v. Western Maryland Rn.*, 271 F. Supp. 361, 362 (D. Md. 1967) (federal question case relying on precedent from diversity litigation and viewing lack of diversity as a "jurisdictional limitation").

¹⁰⁸ 367 F. Supp. at 1038-39 (quoting *Corbi v. United States*, 298 F. Supp. 521, 522 (W.D. Pa. 1969)). *Corbi*, even more bizarrely, contains language on incomplete diversity's destroying jurisdiction—although *Corbi* was a federal question case in which the additional claim was between diverse parties but below the jurisdictional amount requirement. *See id.*

Of course it is nonsense to imply that lack of diversity has any effect whatever on properly invoked federal question jurisdiction. *See* note 105 *supra*; *cf. Jacobs v. United States*, 367 F. Supp. 1275, 1279 (D. Ariz. 1973) ("This is not a case in which joinder would destroy the jurisdiction of the court by destroying diversity. Whether [a nondiverse rule 19 "necessary" party] is in or out of this action the Court has federal question jurisdiction.").

¹⁰⁹ *See, e.g.*, 3B J. Moore, *supra* note 15, ¶ 24.18[1].

¹¹⁰ *See, e.g., id.* ¶ 24.18[3]. There is an exception to the rule stated in text when a rule 24(a)(2) intervenor whose presence would destroy complete diversity qualifies as "indispensable," the theory being that he should have been joined from the beginning and that with his presence the suit could not properly have been in federal court. *See* pp. 977-78 *supra*.

Rule 24(b) (2), however, goes on to provide for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Within this broad description, but still outside the more demanding criteria for intervention of right,¹¹¹ there can fall attempts at intervention arising out of transactions or occurrences already properly before the court.¹¹² Allowing such intervention, even without an independent jurisdictional basis, could well serve the ends of convenience and economy that justify ancillary jurisdiction in other contexts.¹¹³ Most courts and commentators, though, have taken the position that an independent basis of jurisdiction is *always* required for an intervenor proceeding under this provision.¹¹⁴ In diversity cases, in which this question most commonly arises,¹¹⁵ this rule makes excellent sense as long as *Strawbridge* stands; allowing such intervention without independent jurisdiction would allow far too facile a circumvention of the complete diversity requirement.¹¹⁶

In cases brought under federal question jurisdiction, however, the *Strawbridge* policy against having cases in federal court if any adversaries are cocitizens carries no weight. The courts do not seem in permissive intervention cases to have thought the contrary, although, as the preceding Section shows, they have made that mistake elsewhere. Any effects here of diversity jurisdiction have been subtler. The issue whether an independent basis of jurisdiction should be required for permissive intervention has arisen far more frequently in diversity than in federal question litigation,¹¹⁷ which may have obscured the possibility of independent consideration whether the requirement is justified for federal question cases.¹¹⁸ Similarly, the apparent lack of warrant for making individual exceptions to the requirement in diversity cases may have discouraged thinking about whether, in the considerably less common federal question cases, the rule need also be absolute no matter how great the convenience and economy of allowing the permissive intervention sought in a particular instance.¹¹⁹ Imagining a federal court system without diversity jurisdiction helps make clear the need to

¹¹¹ Fed. R. Civ. P. 24(a) :

Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

¹¹² There can also be permissive intervention attempts much less related to the matters before the court, particularly when the prospective intervenor's claim or defense presents only a question of law in common with the main action.

¹¹³ See p. 1001 *infra*; 3B J. Moore, *supra* note 15, ¶ 24.18[1], at 24-752; *id.* ¶ 24.18[3], at 24-782.

¹¹⁴ See, e.g., *Blake v. Pallan*, 554 F.2d 947, 955-56 (9th Cir. 1977) (alternative holding); 3B J. Moore, *supra* note 15, ¶ 24.18[1], at 24-752; 7A C. Wright and A. Miller, *supra* note 42, § 1917, at 592-95 (1972). The statement in text does not apply to permissive intervention under Fed. R. Civ. P. 24(b)(1), "where a statute of the United States confers a conditional right" to intervene; to in rem actions; or to class actions. See 3B J. Moore, *supra* note 15, ¶ 24.18[1], at 24-751 to -753.

¹¹⁵ See 7A C. Wright and A. Miller, *supra* note 42, § 1917, at 586 (1972).

¹¹⁶ See *id.* § 1917, at 593.

¹¹⁷ *Id.* § 1917, at 605 (independent basis will commonly be present in federal question cases).

¹¹⁸ Cf. *Pierson v. United States*, 71 F.R.D. 75, 82 (D. Del. 1976) ("there is no analytic basis for restricting the independent jurisdiction requirement to diversity cases"). Of course there is such a basis: incomplete diversity is a reason for requiring independent jurisdiction over permissive intervention, lest the *Strawbridge* requirement be evaded, but it applies only to diversity cases. The Supreme Court has inferred a considerable degree of congressional hostility to adding nondiverse parties in diversity cases. See, e.g., *Owen Equin. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978). However, there seems to be no parallel hostility—rather, a tolerant neutrality—toward adding state law matters in federal question cases. See *UMW v. Gibbs*, 383 U.S. 715 (1966); cf. *The Supreme Court, 1977 Term*, *supra* note 103, at 253 (concluding that "*Kroger*, when viewed against the backdrop of *Gibbs*, suggests that very different presumptions apply with respect to diversity and federal question cases in determining the scope of [ancillary] jurisdiction."). Such a difference in attitude follows from the nature of the jurisdictions. The "character of the parties" see note 105 *supra*, as completely or incompletely diverse is subject to change by addition of parties; the "character of the cause," see *id.*, as arising or not arising under the Constitution and laws is *not* subject to change by addition of either claims or parties.

¹¹⁹ For a recent exception requiring no independent jurisdictional basis for permissive intervention in a federal question case, see *United States v. Local 638, Enterprise Ass'n of Steam Fitters*, 347 F. Supp. 164, 167-69 (S.D.N.Y. 1972).

Declining to require an independent basis of jurisdiction for permissive intervention in some federal question cases, when the matter raised by the prospective intervenor was closely enough related to the claims before the court, would not turn such cases into de facto instances of intervention of right. Rule 24(b) on permissive intervention explicitly confers discretion on the court, which the court could exercise against intervention if for some reason it would be unhelpful to allow it.

consider what to do in federal question cases independently of the rule adopted for diversity litigation.

C. Pendent Parties

The much-discussed problem of "pendent parties" mainly concerns whether and when a federal court may, without independent grounds of subject matter jurisdiction, assume jurisdiction over a claim against a party not already before it when the party is related, as defined in rule 20(a) on permissive joinder of parties,¹²⁰ to a matter that *is* properly before the court.¹²¹ There is nothing extraordinary about the idea of bringing into a federal case a party who could not have sued or been sued there as an original matter; in the lower courts, at least, it seems well settled that there are several types of joinder for which an independent basis of jurisdiction is never or virtually never required¹²² (as well as others for which such a basis is always or usually essential¹²³). But the pendent party problem is often confusing and difficult, and remains far from fully settled, for several reasons: it has arisen only in the last several years;¹²⁴ it deals for the most part with situations of an intermediate degree of relatedness to claims already within federal jurisdiction, neither so closely nor so distantly connected as to make pendent or ancillary jurisdiction issues seem easy one way or the other;¹²⁵ it arises in various quite distinct contexts;¹²⁶ and it raises questions of both statutory and constitutional boundaries of federal court jurisdiction.¹²⁷

Abolishing diversity jurisdiction would not solve all the problems with pendent parties, but it would help make some points clear. Under the complete diversity rule, adding a party is quite different from adding a claim between existing diverse parties. The latter usually poses no jurisdictional problems at all, since complete diversity exists already and the source of the claim is immaterial to federal jurisdiction, while the former may destroy federal jurisdiction for which this situation prevails; its abolition could reduce predisposition to think broadly that adding parties without independent jurisdictional grounds is somehow taboo.¹²⁸ In particular, abolition might reduce judicial inclinations to find congressional intent to forbid pendent parties in statutes that do not focus on the question. The Supreme Court in recent years has quite properly called attention to the relevance of congressional will, if there be any, to judicial decisions on pendent and ancillary jurisdiction.¹²⁹ The importance of general diversity jurisdiction,

¹²⁰ Fed. R. Civ. P. 20(a):

All persons * * * may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

¹²¹ In addition to the situation defined in text, there can also be efforts to involve pendent parties *plaintiff*, though that situation is not very common. See Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 Va. L. Rev. 194, 216–17, 229–30 (1976). Sometimes, too, cases involving the problem of jurisdiction over plaintiffs' claims against third-party defendants impleaded under Fed. R. Civ. P. 14(a) are treated as pendent jurisdiction matters. See, e.g., *Florida E. Coast Ry. v. United States*, 519 F. 2d 1184, 1193–97 (5th Cir. 1975). Rule 19 necessary party joinder problems occasionally receive such treatment as well. See note 48 *supra*.

¹²² See, e.g., pp. 986–87 *supra* (impleader of third-party defendants, and their assertion of claims against plaintiffs); p. 990 *supra* (intervention of right).

¹²³ See, e.g., p. 986 *supra* (plaintiff's assertion of claim against third-party defendant in diversity case); p. 990 *supra* (permissive intervention).

¹²⁴ The main impetus for developments in this area has come from the Supreme Court's broadening of the concept of pendent jurisdiction over state claims in federal question cases in *UMW v. Gibbs*, 383 U.S. 715 (1966).

¹²⁵ Compare, for example, the close degree of relatedness required for intervention of right, for which there is usually no requirement of an independent basis of jurisdiction, with the distant relation possible in permissive intervention, for which there must normally be an independent ground. See p. 990 *supra*.

¹²⁶ See, e.g., 13 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3567, at 457–59 (pointing out distinctions when reason for lack of independent jurisdictional basis is failure to satisfy amount in controversy requirement, absence of complete diversity in diversity case, or state law basis of claim in federal question case); Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. Pitt. L. Rev. 759, 767–79 (1972).

¹²⁷ See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976). See generally Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 Colum. L. Rev. 127 (1977).

¹²⁸ This analysis thus supports, at least for federal question cases, the position of some present case law and commentary that "there is no magical line to be drawn on the basis of the fact that new parties are added, once the requisite connection exists between claims." 3A J. Moore, *supra* note 15, ¶ 20.07[5.–1], at 20–73.

¹²⁹ See cases cited note 127 *supra*.

though, may obscure the fact that it is probably one of the very few federal jurisdictions in which there is any basis for inferences either way on legislative intentions concerning pendent parties.¹³⁰ In defining most other heads of federal jurisdiction, Congress has spoken of types of claims and not of parties.¹³¹ To seek in such statutes signs of intent whether or not to allow joinder of absentees is likely to be an exercise in futility.

Abolition would also eliminate a misleading comparison between pendent party appropriateness in diversity and federal question cases. This contrast, drawn by the Ninth Circuit in *Aldinger v. Howard*¹³² and summarized with apparent approval in Mr. Justice Rehnquist's opinion for the Supreme Court affirming the decision below, is that "diversity cases generally present more attractive opportunities for exercise of pendent-party jurisdiction, since all claims therein by definition arise from state law."¹³³ The comparison is an appealing one; as a district court applying *Aldinger* put it, it is only when "the main claim involves federal and not state law" that there is room for special "concern over concurrently adding a non-federal party and a non-federal claim" to a case already in federal court.¹³⁴

On analysis, though, the contrast appears entirely specious. Presumably, the courts cannot be talking about cases in which there is a pendent party problem because of failure to meet an applicable jurisdictional amount requirement; recent decisions indicate that that defect bars pendent party jurisdiction at least as strongly in diversity cases as in federal question litigation.¹³⁵ The only relevant comparison is between diversity cases involving efforts to add nondiverse parties and federal question cases involving attempts to add parties whose only involvement is through related state law claims. Whatever the strength of the argument against the latter, if nothing else seems clear in this whole area it does appear incontestable that there is no stronger objection than that against adding nondiverse parties in diversity cases.¹³⁶ Thus, federal question cases are in no sense less "attractive" ones for allowing pendent party treatment than diversity litigation.¹³⁷ The fallacy of *Aldinger's* comparison is apparent without hypothesizing a system lacking general diversity jurisdiction; what abolition would do is elimi-

¹³⁰ The case in which the Supreme Court first made explicit its emphasis on inferences of congressional intent, *Aldinger v. Howard*, 427 U.S. 1 (1976), has since been apparently overruled at least in part by a decision reinterpreting the statute on which *Aldinger's* negative inference rested. See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). But cf. *id.* at 701 n.66 (reserving decision on whether *Aldinger* was correctly decided on its facts). Besides diversity jurisdiction, in which the basis for inferences against pendent parties seems strong, cf. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978) (reenactment of diversity jurisdiction statute without disturbing *Strawbridge*, and dangers of circumvention of complete diversity rule), there appear to be only three other situations in which the *Aldinger* approach is likely to yield much. These are cases involving efforts at adding pendent parties with claims below an applicable jurisdictional amount requirement, see *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 372 (mentioning requirement of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that each member of plaintiff class satisfy \$10,000 jurisdictional minimum), and cases either arising under 28 U.S.C. § 1338(b) (1976) (jurisdiction over state law "claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws") or removed under 28 U.S.C. § 1441(c) (1976) (removability of "entire case" in separate-claim removal). See 3A J. Moore, *supra* note 15, ¶ 20.07[5-1], at 20-79 n.36 (apart from §§ 1338(b) and 1441(c), "all the jurisdictional statutes are silent on this subject").

¹³¹ Apart from diversity, the main exception to this generalization is jurisdiction over cases involving the United States as a party. See 28 U.S.C. § 1345 (1976) (United States as plaintiff); *id.* § 1346 (United States as defendant). Under a major portion of that jurisdiction, the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976), it now appears to be settled—pendent party issues aside—that the statute does not require that the United States be the sole defendant. See, e.g., *Maltais v. United States*, 439 F. Supp. 540, 544-45 (N.D.N.Y. 1977). In other words, party-focused jurisdictional statutes other than diversity need carry no hostility to party joinder analogous to that found in the diversity statute under the *Strawbridge* interpretation.

¹³² 513 F.2d 1257, 1261 (9th Cir. 1975), *aff'd*, 427 U.S. 1 (1976).

¹³³ *Aldinger v. Howard*, 427 U.S. 1, 5-6 (1976).

¹³⁴ *Chatzicharalambous v. Petit*, 430 F. Supp. 1087, 1091, n. 8 (E.D. La. 1977) (emphasis added).

¹³⁵ See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

¹³⁶ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978). This is not to say that the complete diversity requirement always prevails—see p. 985 *supra*—but simply that it is as strong an objection to extensions of federal jurisdiction, based on inference from statute, as the courts have recognized.

¹³⁷ See, e.g., Fortune, *Pendent Jurisdiction—The Problem of "Pendent Parties,"* 34 U. Pitt. L. Rev. 1 (1972); Note, *supra* note 121, at 196; 55 Tex. L. Rev. 941, 947-49 (1977) (commenting on *Aldinger v. Howard*, 427 U.S. 1 (1976)).

nate the basis for this seductive and persistent bit of confusion, facilitating a clearer focus on the justifiability of including or excluding pendent parties.¹³⁸

D. Greater Uniformity in Ancillary Jurisdiction¹³⁹

Abolishing the general diversity jurisdiction should eliminate, or at least very greatly reduce, the influence of the *Strawbridge* rule on "pendent" and "ancillary" jurisdiction determinations in federal question cases. This effect would facilitate (though not mandate) changes in decisional law in several contexts, making less likely a judicial insistence on independent jurisdictional grounds for joinder of related matters in federal question cases. Such changes, if they came about, would produce an increased degree of uniformity in the principles governing federal ancillary jurisdiction.

Currently, as the preceding sections have shown, these principles are anything but regular. Even though the nature of a party's or claim's relations to a dispute in federal court may be the same, ancillary jurisdiction rules often vary for different joinder devices, both as to whether there must be an independent basis of jurisdiction at all and, if there need not be, as to what relations the party of claim must bear to the action to come within ancillary jurisdiction. In diversity cases, once ancillary jurisdiction is permitted to bring in completely diverse parties at all, such disparities seem inevitable because the possibility of permitting evasion of the *Strawbridge* requirement varies under different joinder devices.¹⁴⁰ And the ancillary jurisdiction rules evolved in diversity cases have had a significant carryover effect on the rules applied in federal question cases.

In various ways, of which the appeal of the "pendent party" idea in many lower federal courts is a good example,¹⁴¹ there has been some movement toward a more nearly uniform approach to federal ancillary jurisdiction, based on the notion that the federal courts should at least have discretion to hear and determine matters sufficiently related to claims already before them. It has become increasingly clear, however, that the *Strawbridge* complete diversity rule is a major barrier to carrying such development very far. Allowing ancillary jurisdiction in certain situations, whatever the justifications of relatedness and economy, is simply impossible if there are not to be circumventions of *Strawbridge* that the

¹³⁸ That basic issue remains an unsettled one that divides the lower courts, even in federal question cases, and raises problems of the scope of article III jurisdiction as well as congressional intent under existing jurisdictional statutes. Compare *Ayala v. United States*, 550 F.2d 1196, 1199-200 & n.8 (9th Cir. 1977) (constitutional difficulties underlie Ninth Circuit's rejection of pendent party theory), *cert. dismissed*, 435 U.S. 982 (1978), with, e.g., *Wood v. Standard Prods. Co.*, 456 F. Supp. 1098, 1100-03 (E.D. Va. 1978) (declining to follow *Ayala*); *Pearce v. United States*, 450 F. Supp. 613 (D. Kan. 1978) (same).

¹³⁹ There seems to be much confusion surrounding the labels "ancillary jurisdiction" and "pendent jurisdiction," and indeed their usage has often been far from consistent. There is a fairly clear core meaning to "pendent jurisdiction," namely a federal court's authority to hear a federal question plaintiff's state law claim against the same defendant without independent jurisdictional grounds, as long as the federal and state claims are part of a "common nucleus of operative fact." *UMW v. Gibbs*, 383 U.S. 715, 725 (1966). "Pendent party" cases represent efforts to use the *Gibbs* definition and economy rationale to support joinder not of related state law claims against existing parties but of such claims against outsiders not themselves subject to claims within independent federal jurisdiction. See generally *Aldinger v. Howard*, 427 U.S. 1 (1976).

"Ancillary jurisdiction" is a broader term most commonly used to refer to the authority of federal courts in several types of situations to hear and determine, again without independent jurisdictional grounds, matters involving claims and parties closely related to the claim supporting original jurisdiction, such as compulsory counterclaims, cross-claims, third-party claims, and intervention of right. See *Owen Equip. & Erecton Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978). One way of summarizing the distinction is that "pendent" jurisdiction refers to matters that are, or at least could be, stated in the original complaint, whereas "ancillary" jurisdiction refers to those matters that can only come in by later addition of claims or parties. See Comment, *supra* note 127, at 128 n.5.

For convenience, this Section will often use the term "ancillary jurisdiction"—without quotation marks—in a generic sense, including situations to which the label "pendent" would often apply. Whatever label a court uses, the underlying problem is the same: whether to require an independent basis of federal jurisdiction.

¹⁴⁰ For example, allowing ancillary jurisdiction in diversity cases for rule 20(a) permissive joinder of nondiverse parties would leave little of the *Strawbridge* rule; permitting rule 14(a) impleader of a defendant's cocitizen without independent jurisdictional grounds leaves the requirement of complete diversity for original jurisdiction intact and leads to no further *Strawbridge* problems if the plaintiff and the impleaded third-party defendant seek to press claims against each other.

¹⁴¹ See, e.g., *Pearce v. United States*, 450 F. Supp. 613, 615-16 (D. Kan. 1978) (weight of lower court authority before *Aldinger v. Howard*, 427 U.S. 1 (1976), against Ninth Circuit's rejection of pendent party jurisdiction).

courts are unwilling to tolerate.¹⁴² This concern may have contributed to the Supreme Court's refusal in the nondiversity case of *Aldinger v. Howard*¹⁴³ to accept invitations to regard the lines of cases dealing with "pendent" and "ancillary" jurisdiction as having merged.¹⁴⁴ The danger of too-easy evasion of the complete diversity requirement is strongest with "pendent" (initial) joinder because, if the courts allow it in the face of *Strawbridge* problems, a plaintiff can simply join the nondiverse party in his complaint, effectively nullifying the complete diversity rule.¹⁴⁵ As is shown by decisions allowing "ancillary" (subsequent) joinder in some situations despite *Strawbridge* problems, however, these concerns are reduced if a plaintiff must rely on the initiative of the defendant or an intervenor to effect the joinder of a nondiverse party against whom the plaintiff would like to claim.¹⁴⁶

Abolition would eliminate these reasons for distinguishing between joinder routes, so that the federal courts could much more often make decisions an ancillary jurisdiction animated solely by the idea of economical settlement of related claims in a single litigation. Even after abolition, though, some legitimate concerns would still restrain the federal courts from expanding their ancillary jurisdiction as far as the Constitution might permit. A first such concern, if the complete diversity rule in the alienage jurisdiction were not overruled by statute or decision, would come from that remainder of *Strawbridge* itself. Second, the Supreme Court has indicated that it regards unsatisfied amount in controversy requirements as precluding the extension of ancillary jurisdiction in certain situations.¹⁴⁷ And under the Court's emphasis on seeking congressional intent concerning ancillary jurisdiction in statutes affecting federal jurisdiction, the courts may discover further indications of intent to leave them no discretion to allow ancillary jurisdiction.¹⁴⁸

Yet it seems likely that once general diversity jurisdiction were abolished, the list of situations in which the federal courts would feel they could not exercise ancillary jurisdiction would not be a long one. The alienage jurisdiction, in which cases are not very numerous to begin with, might require only minimal diversity.¹⁴⁹ The 1978 House bill would have virtually eliminated amount in controversy requirements, abolishing the general diversity jurisdiction in which they apply and repealing such little of an amount requirement as survives today for federal question cases.¹⁵⁰ Moreover, most indications of congressional intent other than the complete diversity rule seem neutral or favorable towards ancillary jurisdiction.¹⁵¹

¹⁴² See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978) (*Strawbridge* rule requires independent basis of federal jurisdiction for diversity plaintiff's claim against nondiverse third-party defendant); *Parker v. W. W. Moore & Sons*, 528 F.2d 764, 766 (4th Cir. 1975).

¹⁴³ 427 U.S. 1, 12-13 (1976).

¹⁴⁴ See, e.g., Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. Rev. 1263 (1975).

¹⁴⁵ Joinder, as by later amendment of the plaintiff's complaint, of something that might have been pleaded originally should receive the same treatment as material included in the original complaint. What matters is not the formality of inclusion in the complaint as initially filed but the reality of plaintiff's ability to accomplish the joinder on his sole initiative.

¹⁴⁶ Another possible distinction between "pendent" and "ancillary" jurisdiction is that denial of jurisdiction at the beginning of a litigation makes it clear that if the case is to proceed as a whole (and if it contains no claim within exclusive federal jurisdiction) it must be in state court, thus encouraging litigants not to waste time on two separate proceedings. With later determinations, by contrast, at least part of the case is already properly in federal court and will probably remain there; hence, to avoid duplication, the court should be more lenient in its definition of what it will accept as "ancillary." See Comment, *supra* note 127, at 149 n.115. This view makes sense if the federal courts are sometimes constrained to stop short of the constitutional limits of their jurisdiction in "pendent" cases: it provides a basis for pushing closer to constitutional bounds when economy considerations are most pressing. This Section goes on to suggest, however, that after abolition it would be possible and desirable to adopt a more nearly uniform approach toward ancillary jurisdiction generally. In that case, there would be no need to push beyond the limits on initial "pendent" joinder in postfiling "ancillary" cases, since the limits in both would be defined by a common constitutional criterion.

¹⁴⁷ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978).

¹⁴⁸ See, e.g., *Depaja Enterprises Ltd. v. American Bank & Trust Co.*, 454 F. Supp. 413, 4155-16 (S.D.N.Y. 1978) (holding "pendent party" jurisdiction impermissible in action brought under 12 U.S.C. § 1819 (1976), which authorizes Federal Deposit Insurance Corporation to sue and be sued in federal courts).

¹⁴⁹ See pp. 966-68 *supra*.

¹⁵⁰ See H.R. 9622, 95th Cong., 2d Sess. § 1(b) (1978), *Senate Hearings*, *supra* note 1, at 10 (repealing general diversity jurisdiction); *id.* § 2(a), *Senate Hearings*, *supra* note 1, at 11 (eliminating amount in controversy requirement from general federal question jurisdiction statute, 28 U.S.C. § 1331 (1976)).

¹⁵¹ See note 130 *supra*.

After abolition, then, there would often be no *statutory* fetters on the ancillary jurisdiction of the federal courts. When there are none, the Supreme Court has indicated, the federal courts are free "to fashion [their] own rules under the general language of Art. III."¹⁵² It is not yet settled, particularly for pendent parties, exactly what those rules are; but apparently they would permit ancillary jurisdiction in accordance with a general criterion of economical settling of related claims in one litigation.¹⁵³ There could thus be more frequent resort to a common constitutional criterion,¹⁵⁴ displacing the present bewildering array of discrete and irregular rules requiring or not requiring independent jurisdictional grounds for different types of joinder and under different heads of jurisdiction. It would less often be necessary to decide first whether to require an independent basis of jurisdiction, and then, if none were required, whether a particular case came within the standards for ancillary jurisdiction; the criteria for both determinations would be the same, thus merging them. For those situations governed by constitutional ancillary jurisdiction criteria, then, there would be a fairly simple, uniform approach: If a party or claim met the criteria of the Federal Rules for joinder and of the Constitution for ancillary jurisdiction, it could be joined without an independent basis of jurisdiction. If it met rule criteria but not those of the Constitution (as would be true, for example, of many instances of permissive intervention), there could be joinder but only with independent jurisdiction. And failure to meet rule criteria for joinder would end the matter without need for inquiry into jurisdiction.

E. Conclusions

Uncritical overextensions of principles developed in one context into other areas are not unique to the general diversity jurisdiction, but it does seem to engender them uncommonly often. Thinking about a system without diversity jurisdiction brings out ways in which courts today sometimes display confusion in analysis because of inappropriate influences from and comparisons with diversity case law. Even if Congress never abolishes diversity, this approach suggests that the federal courts in federal question cases should treat absence of complete diversity as wholly irrelevant to decisions whether to require an independent basis of federal jurisdiction, and should not automatically apply the restrictive rules evolved in and for diversity situations. Moreover, if diversity is abolished, there should follow greater movement toward simplicity and uniformity in ancillary jurisdiction matters than seems possible today with the complicating influence of the *Strawbridge* rule.

IV. FACILITATION OF STATUTE AND RULE CHANGES

The present federal judicial system has been constructed with diversity jurisdiction as a major starting point; any change so fundamental as abolition would inevitably have far-reaching effects on many aspects of the system. The preceding Part discussed effects on decisional law. This Part considers significant reforms requiring changes in rules or statutes that might be made more readily because of diversity's absence.¹⁵⁵ The discussion cannot be conclusive, since independent considerations affect the desirability of such reforms: the point generally is not that without diversity certain steps should clearly be taken, but simply that abolition would affect the balance of considerations for and against them.

¹⁵² *Aldinger v. Howard*, 427 U.S. 1, 15 (1976).

¹⁵³ See pp. 1001-02 *infra*.

¹⁵⁴ It seems reasonable to expect that there would be a common constitutional criterion, not varying from one type of joinder to another. The Supreme Court in *UMW v. Gibbs* was speaking of the constitutional limits on federal judicial power when it used the general language of "common nucleus of operative fact" and a plaintiff's claims' being "such that he would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. 715, 725 (1966). If the jurisdiction-conferring and pendent claims are related in this way, that "permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *Id.* There seems to be nothing in the idea of a "constitutional 'case'" that would require differing treatment of similar situations depending on the type of joinder, which the *Strawbridge* rule, based on statutory interpretation, does seem to entail. See p. 996 *supra*.

¹⁵⁵ This Part does not consider any of the myriad possible expansions of federal court jurisdiction that might become more attractive simply because of the elimination of any large fraction of the present federal court caseload, but only those changes that would in some way be facilitated because it was *diversity* that had been abolished.

A. Uniform Ancillary Jurisdiction Statute

However far the federal courts might want to move after abolition of diversity toward greater uniformity in ancillary jurisdiction,¹⁵⁶ it seems clear that the Supreme Court would regard as inappropriate a judicial initiative aimed at full rationalization of the area. Since Congress regulates the jurisdiction of the federal courts, the Supreme Court in the face of lower court extensions of jurisdiction has properly stressed the need to look to whether "the statute conferring jurisdiction over the federal claim [allows] the exercise of jurisdiction over the nonfederal claim."¹⁵⁷ As the Court has pointed out, "There are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts."¹⁵⁸ Thus, even though abolition might result in greatly increased uniformity in ancillary jurisdiction through decisional development, there would likely remain a considerable degree of the present irregularity.

The very deference to congressional intent that might preclude a full-scale judicial cleanup of ancillary jurisdiction, though, suggests that the federal courts would follow a congressional lead in that direction. If a good deal of the present lack of uniformity survived case law development after abolition, then Congress might do well to take the Court's approach as an invitation to eliminate the complexities and uncertainties that now work to defeat the purpose of ancillary jurisdiction—fostering economy for courts and litigants by making possible the settling of related claims in a single case.¹⁵⁹

The present difficulties mostly concern the decision whether to require an independent jurisdictional basis for the ancillary claim; the many factors that influence that decision for different heads of jurisdiction and for various joinder devices produce the current confusing welter of rules requiring independent grounds in some cases and not in others. There seems to be relatively little disagreement or difficulty, though, about how far ancillary jurisdiction ought to extend once freed of the limiting factors that now force the courts to conclude they must require independent grounds of jurisdiction in various situations no matter what the desirability of joinder. When federal courts defining the boundaries of their ancillary jurisdiction have felt free to focus on what a litigation should optimally comprise, rather than on congressional intent, the effect of the complete diversity rule or other problems, they have in various contexts articulated definitions very similar in effect and often in phrasing. The theme has been the same as that found in increasingly accepted articulations of what constitutes an appropriate litigation unit for purposes of many aspects of joinder¹⁶⁰ and preclusion:¹⁶¹ there can be ancillary jurisdiction over a claim that arises "out of the same transaction or occurrence or series of transactions or occurrences"¹⁶² as the jurisdiction-conferring claim.¹⁶³

By means of a statute authorizing the federal courts to exercise their ancillary jurisdiction in accordance with these concepts, Congress could free the federal

¹⁵⁶ See pp. 995–99 *supra*. This Section will use the term "ancillary" to include jurisdiction often labeled "pendent." See note 139 *supra*.

¹⁵⁷ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) (footnote omitted).

¹⁵⁸ *Aldinger v. Howard*, 427 U.S. 1, 18 (1976). Whatever the variations in language, it may well turn out that only a few jurisdictional statutes provide any basis for inferring congressional intent for or against the exercise of ancillary jurisdiction, see note 130 *supra*, a situation that might result in irregularity in ancillary jurisdiction decisions because of the lack of guidance for judicial determinations under other statutes.

¹⁵⁹ See, e.g., 6 C. Wright and A. Miller, *supra* note 42, § 1414, at 73.

¹⁶⁰ See Fed. R. Civ. P. 13(a) (compulsory counterclaims) ("arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"); Fed. R. Civ. P. 14(a) (claims between plaintiff and third-party defendant) ("any claim * * * arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim" against the original defendant); Fed. R. Civ. P. 20(a) (permissive party joinder) ("arising out of the same transaction, occurrence, or series of transactions or occurrences").

¹⁶¹ See Restatement (Second) of Judgments § 61(1) (Tent. Draft No. 5, 1978) (claim preclusion) ("all or any part of the transaction, or series of connected transactions, out of which the action arose").

¹⁶² ALI Study, *supra* note 14, at 28 (proposed 28 U.S.C. § 1313(a)).

¹⁶³ The language of such formulations may differ. The Supreme Court has defined a pendent state law claim for purposes of the constitutional reach of federal court jurisdiction as one that derives "from a common nucleus of operative fact," so that "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." *UMW v. Gibbs*, 383 U.S. 715, 725 (1966). But the effect of the various phrasings is the same: thus the ALI's "same transaction or occurrence" formulation attempts to codify the Supreme Court's "common nucleus of operative fact" concept. On the essential identity of these definitions, see Restatement (Second) of Judgments 138–44 (Tent. Draft No. 5, 1978); Note, *The Concept of Law-Tied Pendent Jurisdiction*: Gibbs and Aldinger Reconsidered, 87 Yale L.J. 627, 631 n.26 (1978).

courts from the fetters that complicate the area today.¹⁶⁴ One possible approach to the drafting of such a statute would be that followed by the American Law Institute in a proposed pendent jurisdiction statute, defining the relationship an ancillary matter must bear to claims already before the court.¹⁶⁵ An alternative that would minimize drafting problems, and avoid some other difficulties,¹⁶⁶ would be for the statute to confer explicitly on the federal courts authority to exercise their ancillary jurisdiction over any form of joinder authorized by rule or other statute, to the extent permitted by the Constitution.¹⁶⁷ Since the "same transaction or occurrence" formulation itself probably defines the general constitutional limits of federal ancillary jurisdiction,¹⁶⁸ the aim of drafting a statute referring in terms to the Constitution would be to duplicate the effect of a broadly drafted ALI-model statute, without forcing determinations whether the chosen formulation exceeded constitutional bounds or renouncing the benefits of any ancillary jurisdiction that might be constitutional yet excluded by some particular phrasing. Whatever the drafting approach, such a uniform ancillary jurisdiction statute could clarify a confused area of the law and eliminate redundant litigation by making it more often possible to litigate related claims in one proceeding.¹⁶⁹

¹⁶⁴ The troublesome limitations, after all, are inferred requirements of the jurisdictional statutes, mainly complete diversity but also others such as the rule that parties brought in on an ancillary basis often must independently satisfy the jurisdictional amount requirement. See p. 998 *supra*.

¹⁶⁵ See ALI Study, *supra* note 14, at 28 (proposed 28 U.S.C. § 1313(a), employing phrasing quoted in preceding text paragraph).

¹⁶⁶ A statute drafted as the text suggests, referring in terms to the constitutional limits of ancillary jurisdiction instead of articulating a definition of its scope, would make it unnecessary to consider writing special extensions for forms of joinder that do not fit the conventional "same transaction or occurrence" formulation yet have been regularly held to come within ancillary jurisdiction. Rule 14(a) impleader, for example, "is considered ancillary even though such an action does not, as a general rule, directly involve the aggregate of operative facts upon which the original claim is based." *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.* 426 F.2d 709, 715 (5th Cir. 1970). See also, e.g., 13 C. Wright, A. Miller and E. Cooper, *supra* note 16, § 3523, at 67 (ancillary jurisdiction over permissive counterclaims that take form of setoff).

If the aim were to confine ancillary jurisdiction short of constitutional limits, the ALI approach with the additional requisites specified would probably be more workable. The ALI Study proposed requirements in the alternative for a common question of fact or a need to determine a state claim in order to give effective relief on the jurisdiction-conferring federal claim. See ALI Study, *supra* note 14, at 28 (proposed 28 U.S.C. § 1313(a)).

¹⁶⁷ There should not be grounds for concern over excessive breadth in such an approach, since the joinder rules would continue to provide guidance and limitation.

¹⁶⁸ There are a few exceptional situations that fall outside the formulation yet are held within ancillary jurisdiction, see note 166 *supra*, apparently on the theory that joinder still clearly serves the ends of economy and convenience.

Formulations based on the "same transaction or occurrence" phrasing probably would not exceed constitutional bounds because their effect is similar or identical to the articulation of the scope of a "constitutional 'case'" by the Supreme Court in *UMW v. Gibbs*, 383 U.S. 715, 725 (1966). *Gibbs* did, however, deal with addition of claims between existing parties and not with addition of parties, and the Court has recently emphasized—though in a statutory, not a constitutional context—that the two are quite different. See *Aldinger v. Howard*, 427 U.S. 1, 14–15 (1976). Moreover, the state of the law on the constitutionality of adding parties as a matter of ancillary jurisdiction is rather surprisingly underdeveloped. There seems to be a universal assumption in the lower courts that in at least some types of situations, ancillary jurisdiction over parties need not be justified by sheer necessity, as it was in the leading early ancillary jurisdiction case of *Frceman v. How*, 65 U.S. (24 How.) 450 (1860). Instead, it may extend to parties whose presence will do no more than serve the important but hardly imperative goals of convenience and economy. See, e.g., cases cited in *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978). Yet the Supreme Court in modern times has never had to confirm or reject the assumption on which the lower courts have been operating for decades. See *id.*

Still, it seems most unlikely that the Court would hold ancillary jurisdiction over claims involving new parties to be outside constitutional bounds if the "same transaction or occurrence" or "common nucleus of operative fact" test were met. The Court has failed to reserve the question in cases in which it might have done so, see, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 375 & n. 18; *Aldinger v. Howard*, 427 U.S. at 14–15, seeming to proceed from the general constitutionality of such ancillary jurisdiction as a premise it was not merely assuming arguendo and emphasizing the statutory limits on federal jurisdiction in addition to the boundaries set by article III, see *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 371–77. Further, it is hard to see how adding a claim involving a new party is constitutionally different from adding a claim against an already joined party if the test is whether the claims are such that one "would ordinarily be expected to try them all in one judicial proceeding" and all the claims do "derive from a common nucleus of operative fact." *UMW v. Gibbs*, 383 U.S. at 725. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 379 (White, J., dissenting) ("as far as Art. III of the Constitution is concerned, the District Court had power to entertain Mrs. Kroger's claim against Owen"); 3A J. Moore, *supra* note 15, § 20.07[5–1], at 20–73 ("there is no magical line to be drawn on the basis of the fact that new parties are added, once the requisite connection exists between claims"). See also *Synn v. United States*, 47 U.S.L.W. 3480 (U.S. Jan. 15, 1979) (affirming without opinion, over dissent urging lack of pendent party jurisdiction, decision apparently involving exercise of such jurisdiction).

¹⁶⁹ A significant additional effect of a statute that would probably not result from case law development would be the elimination of amount in controversy problems in ancillary jurisdiction determinations, assuming that the uniform statute permitted ancillary jurisdiction without regard to amount in controversy.

B. Nationwide Service of Process¹⁷⁰

Under rule 4 of the Federal Rules of Civil Procedure, the general authority of the federal courts to serve process is confined to the borders of the state in which the court sits, the authorizations of that state's long arm statute, and some limited extensions. The spread of comprehensive state long arm provisions has greatly expanded the federal courts' ability to effect service of process out of state: but the states' approaches vary considerably, and a few still lack anything resembling a modern long arm statute.¹⁷¹ Moreover, the restriction to state long arm authority applies just as fully to federal question cases (when there is no special federal statute allowing broader service) as it does to diversity actions. But because the United States is treated like one big state for purposes of constitutional limits on federal courts' personal jurisdiction in federal question cases,¹⁷² what could fail to come within even a broad state long arm provision might still satisfy due process requirements for a federal district court's exercise of personal jurisdiction.¹⁷³ The most liberal of state long arms, then even if adopted in all states, would leave some gap between the constitutional limits on federal courts' process and those cases they could reach by piggybacking on state court authority.¹⁷⁴

A nationwide federal service provision available in diversity cases might raise significant problems, however, because it could bring before a federal court persons who could not have been sued in the courts of the same state. Were they sued elsewhere, the conflicts law and substantive law applied might differ from what the (unavailable) courts of the first state would have followed. Under existing federal court process authority, then, the substantive law that the first state would apply could not normally govern these parties. But under the *Klaxon* rule,¹⁷⁵ a federal court choosing among potentially applicable state laws must follow the conflicts law of the state in which it sits, at least in diversity cases. Hence, nationwide service might bring into federal court parties not subject to state process and, because of the *Klaxon* rule, subject them to a regime of substantive law that could not otherwise have been applied to them.¹⁷⁶ Because of the existence of diversity jurisdiction, which under *Erie* is not supposed to add to the number of possibly applicable substantive law regimes, nationwide service could produce precisely that result.

¹⁷⁰ This Section uses the common and convenient term of "nationwide" process, but that is not meant to exclude the possibility of even broader authority, such as foreign service employed to the limits of federal constitutional power.

¹⁷¹ See, e.g., Iowa Code Ann. § 617.3 (West Supp. 1978-1979) ("doing business" provision).

¹⁷² See, e.g., *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) ("It is not the State * * * but the United States 'which would exercise its jurisdiction over' the defendants). A federal court hearing a case within its diversity jurisdiction, by contrast, is effectively acting as a court of the state in which it sits. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

¹⁷³ See *Driver v. Helms*, 74 F.R.D. 382, 390-91 (D.R.I. 1977) (citations and footnote omitted), *aff'd in part and rev'd on other grounds in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted in part sub nom. Colby v. Driver*, 47 U.S.L.W. 3482 (U.S. Jan. 15, 1979) (No. 78-303).

For those cases in which Congress has decided that the jurisdiction of federal courts shall be coextensive with the jurisdiction of the states in which they sit (that is, all cases directly ruled by Rule 4(d)), minimum contacts analysis is indeed in order. State courts may exercise jurisdiction only over defendants within their territory or over defendants who are deemed present within the territory by virtue of purposeful activity which constitutes such minimum contacts. *International Shoe [Co. v. Washington]*, 326 U.S. 310 (1945).

However, Congress may provide for national service of process, i.e., national exercise of personal jurisdiction by each of the district courts based on presence of the defendant in the United States, rather than in any particular state. * * * When Congress does so provide, the district court's service is not constrained by the due process * * * limits to which state courts are subject. * * * Instead, the due process limitation on national service of process is found by inquiring into the fairness of such jurisdiction in the particular circumstances and facts of the case at hand, an inquiry mandated by the Fifth Amendment Due Process Clause.

¹⁷⁴ The gap between a liberal state long arm statute and the constitutional applicability of a federal nationwide process provision would probably not be wide, and the need to satisfy venue requirements for suit in federal court would further limit the number of occasions that federal nationwide service might bring a party before federal court when resort to the state's long arm could not. However, those cases in which the federal nationwide process provision might be needed could be important ones, since the process might make the difference between being able to bring all parties in a multiparty dispute before a single forum and having to proceed in several forums.

¹⁷⁵ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

¹⁷⁶ See Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963* (1), 77 Harv. L. Rev. 601, 633-34 (1964).

There are several other areas in which this problem either can arise at present because of federal service authority exceeding that of state courts¹⁷⁷ or could arise if there were nationwide service.¹⁷⁸ Yet it seems likely that the problem arise by far the most frequently in diversity cases.¹⁷⁹ Given this situation, the rule-makers understandably did not adopt nationwide service generally, but it is questionable why they did not bifurcate the rule—confining federal process to that authorized by the state in diversity cases, yet providing for nationwide service in other actions.¹⁸⁰ Abolition of diversity jurisdiction, by eliminating the category in which nationwide service would most frequently raise the problem described above, would change the balance of factors that led to the present rule and offer a good opportunity for consideration of broader nationwide service authority.

C. Uniform Rule on Testimonial Privileges

In 1972, the Supreme Court proposed the Federal Rules of Evidence,¹⁸¹ including an article V that would have established a detailed set of rules for testimonial privileges without regard to the basis of jurisdiction over a case or the source of law relevant to the issue in connection with which a witness claimed a privilege.¹⁸² Congress, concerned that in diversity cases state law should provide not only the substantive rules of decision but also the rules of privilege,¹⁸³ replaced the proposed article with a single rule providing for a federal common law of testimonial privileges in civil cases, but requiring reference to state privilege law "with respect to an element of a claim or defense as to which State law supplies the rule of decision."¹⁸⁴

The objection to the idea of a uniform set of privilege rules for the federal courts seems more political than legal (which is not to imply that it is inappropriate). Professor Ely described it as "a feeling that by refusing to recognize in diversity cases the privileges provided by local law, the federal government was making law that should be made by the states."¹⁸⁵ There is considerable agreement, nonetheless, that whatever the desirability of the existing provision, *Erie* does not mandate observance of state privilege rules.¹⁸⁶

The great reduction in the number of state law issues in federal courts that would follow from abolishing diversity would significantly affect the political equation that led to the present rule, making it feasible to reconsider the idea of a uniform set of federal privilege rules. The objections to the idea of uniformity that helped cause rejection of the 1972 proposal would have considerably less weight simply because the occasions for application of state rules would become much less frequent.¹⁸⁷

¹⁷⁷ For statutory interpleader pursuant to 28 U.S.C. § 1335 (1976), there is special provision, *id.* § 2361, for nationwide service. In the case that most sharply illustrates the problem discussed in the text, the Supreme Court in *Griffin v. McCoach*, 313 U.S. 498 (1941), held that a federal court in a statutory interpleader case must follow the conflicts law of the state in which it sits. Federal Rule 4(f) permits service up to 100 miles from the courthouse on parties to be added under rules 14 and 19, which might also exceed the reach of some states' authority. See Kaplan, *supra* note 176, at 630, 633; Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U. L. Rev. 1053, 1071-76 (1953). And there are numerous specific provisions for extraterritorial service in actions under various federal statutes. See 2 J. Moore, *supra* note 15, ¶ 4.42[I], at 4-518 to 523.

¹⁷⁸ Nationwide service would introduce these problems in alienage cases and in actions involving pendent state claims in which extraterritorial service is not now available.

¹⁷⁹ Cases in statutory interpleader raising this problem seem to be infrequent; state long arm authority could probably reach most parties brought into federal court under the 100-mile "bulge" of Fed. R. Civ. P. 4(f); and the alienage caseload is not heavy, see note 13 *supra*.

¹⁸⁰ See generally Kaplan, *supra* note 176, at 631 & n.130. The American Law Institute has proposed nationwide service for cases within general federal question jurisdiction, see ALI Study, *supra* note 14, at 31 (proposed 28 U.S.C. § 1314), with service in diversity cases left unchanged, see *id.* at 216.

¹⁸¹ Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 184 (1972) (Order of Nov. 20, 1972) [hereinafter cited as Proposed Evidence Rules].

¹⁸² See *id.* at 230-61.

¹⁸³ See Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 693-94 (1974). There was also considerable opposition to the substance of the privilege proposals. See *id.*

¹⁸⁴ Fed. R. Evid. 501.

¹⁸⁵ Ely, *supra* note 183, at 694.

¹⁸⁶ See, e.g., 10 J. Moore, *supra* note 15, § 501.05. For the Advisory Committee's argument to the same effect, see Proposed Evidence Rules, *supra* note 181, 56 F.R.D. at 232-33.

¹⁸⁷ If the present rule were retained, abolition would not make it unworkable; it could continue to operate just as it does now, but with the federal courts applying federal evidence law most of the time (thus increasing the degree of uniformity), while applying state rules in the reduced number of cases in which they would govern.

D. The Proper Uses of Citizenship-Based Federal Jurisdiction

Even the most vigorous advocates of abolishing the general diversity jurisdiction seem to agree on the retention of statutory interpleader,¹⁸⁸ for which scattered sections of the Judicial Code¹⁸⁹ provide subject-matter jurisdiction, venue, and nationwide service of process in cases involving minimally diverse defendants and a stake of \$500 or more. Underlying this consensus is acceptance of the need to make sure a forum is available to resolve disputes among scattered claimants to a common fund or asset, a situation that threatens to leave a stakeholder liable on more than one mutually exclusive claim if he cannot join all the claimants.¹⁹⁰ Since it is sometimes possible that no state court could enable him to do so,¹⁹¹ only the federal system can always provide a forum. Similarly, there seems to be no inclination to eliminate federal alienage jurisdiction;¹⁹² like statutory interpleader, it rests at least in part on a rationale—possible effect on American foreign relations—that is independent of the concern for prejudice against outsiders commonly used to explain general diversity.

Statutory interpleader and alienage are widely accepted as entirely appropriate uses of the federal courts' article III judicial power over "Controversies * * * between Citizens of different States * * * and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Another such use is the recently revised federal jurisdiction over cases involving a foreign state as plaintiff¹⁹³ or defendant.¹⁹⁴ Of course, many believe that general diversity is itself a desirable use of Congress' authority to create citizenship-based federal jurisdiction. Whatever the merits of that position, general diversity and the *Strawbridge* rule have imposed focus on precisely what uses there should be of citizenship-based federal jurisdiction. An incidental but significant effect of abolition would be to facilitate consideration of appropriate limited uses and their proper characteristics.¹⁹⁵

A first illustration of general diversity's effect in impeding inquiry into these questions is the extension to alienage cases of the complete diversity rule, discussed in Part I of this Article. In the case of interpleader, Congress seems to have perceived that the rule would be at odds with the purpose of the device¹⁹⁶ and wrote in a minimal diversity requirement instead.¹⁹⁷ Yet in the shadow of the general diversity jurisdiction and the *Strawbridge* rule, to my knowledge no court has ever noted that the complete diversity requirement runs quite as contrary to the foreign relations concern underlying the alienage jurisdiction¹⁹⁸

¹⁸⁸ See, e.g., H. Friendly, *supra* note 3, at 150.

¹⁸⁹ 28 U.S.C. §§ 1335, 2361 (1976).

¹⁹⁰ See *New York Life Ins. Co. v. Dunlevy*, 241 U.S.C. 518 (1916).

¹⁹¹ Since the *Dunlevy* case, *id.*, and the subsequent enactment of the federal interpleader provisions, there have come state long arm statutes making it more often possible for state courts to reach distant claimants, plus developments in the constitutional law of personal jurisdiction recognizing the significance for the scope of personal jurisdiction of difficulty in finding a forum, see, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 906 & n.10, 458 P.2d 57, 67 & n.10, 80 Cal. Rptr. 113, 123 & n.10 (1969). See generally 3A J. Moore, *supra* note 15, § 22.04[2.-2], at 22-28 to -32. These developments suggest that federal statutory interpleader may no longer be so sorely needed, but as long as some states have restrictive long arm provisions, see note 171 *supra*, the *Dunlevy* problem could readily recur and the need for the federal provision seems clear.

¹⁹² See, e.g., H.R. 9622, 95th Cong., 2d Sess. § 1(b) (1978), *Senate Hearings, supra* note 1, at 10 (abolishing general diversity but retaining alienage subsections); H. Friendly, *supra* note 3, at 149-50.

¹⁹³ 28 U.S.C. § 1332(a) (3) (1976).

¹⁹⁴ *Id.* § 1330(a).

¹⁹⁵ Abolition of general diversity would make removal to federal court unavailable to out-of-state defendants sued on state claims in state courts, since removal is usually available only in cases that would have been within original federal jurisdiction. See *id.* § 1441(a). Given removal's general unavailability, one idea for limited citizenship-based jurisdiction would be to permit removal on some showing of local bias. See, e.g., Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 n.4 (1976). However, such a mechanism would probably result in so much purely procedural litigation as to swamp any benefits it would produce. See Comment, *Diversity Removal Where the Federal Court Would Not Have Original Jurisdiction: A Suggested Reform*, 114 U. Pa. L. Rev. 709, 711-12 (1966).

¹⁹⁶ Complete diversity in interpleader would presumably require that the stakeholder-plaintiff not be a citizen of the same state as any claimant-defendant. Yet shared citizenship with one or more (but less than all) claimants makes the stakeholder no more able to bring the others into a single state court than if he shared citizenship with none, thus leaving him exposed to multiple liability if excluded from federal court.

¹⁹⁷ 28 U.S.C. § 1335(a) (1) (1976). The Supreme Court has upheld the constitutionality of basing federal jurisdiction on minimal diversity. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

¹⁹⁸ See p. 968 *supra*.

as it would to the danger of forum unavailability justifies federal statutory interpleader.

The American Law Institute's proposal for a "dispersed necessary parties" jurisdiction also illustrates the difficulties that diversity jurisdiction produces in this area. At present, American courts provide neither a general procedural device nor a guaranteed forum offering resolution in one litigation of all related matters arising out of multiparty, multistate disputes.¹⁹⁹ Apparently in partia response to that problem, the ALI's *Study of the Division of Jurisdiction Between State and Federal Courts* proposed special federal jurisdiction for cases involving at least minimal diversity and necessary parties not all amenable to process in one state.²⁰⁰ As Professor David Currie pointed out,²⁰¹ the problems created by Strawbridge provided the main impetus for the proposal: without the complete diversity rule, a case that came within the ALI's definition (and satisfied amount in controversy requirements) would come within the general diversity jurisdiction. Professor Currie questioned the need for the provisions, noting that the ALI had given "not one example * * * of a case requiring this treatment."²⁰²

It is not hard, though, to give examples of cases that could benefit from the availability of some action-consolidating device—situations such as mass torts involving plaintiffs from many states. There have been some efforts in that direction, employing devices such as class actions,²⁰³ transfer of venue,²⁰⁴ consolidated pretrial proceedings,²⁰⁵ and preclusion rules.²⁰⁶ But it remains possible for such judicial circuses to go to trial in several rings and for there to be inconsistent outcomes. The ALI's proopsal shows how diversity jurisdiction and the *Strawbridge* rule can send efforts in this field into obscure corners. After abolition, at least, discussion could proceed free from the possible distractions of the complete diversity rule and the dangers of creating circumventions of it, focusing instead on the types of situations in which the federal courts could usefully provide a forum for multistate disputes and on the sorts of procedural devices that would be appropriate.²⁰⁷

V. CONCLUSION

Even if courts, legislators, and rulemakers took little advantage of the opportunities offered by abolition for further change and development, the considerable simplification in federal practice resulting from abolition would be an important benefit of the measure, rendering mostly superfluous the "enormous infrastructure that has grown up to support and to define the diversity jurisdiction."²⁰⁸ Many complex problems that are largely products of the diversity jurisdiction would virtually disappear. Beyond these benefits, abolition would facilitate several decisional developments and statutory and rule reforms that are now difficult or impossible because of problems that flow from diversity jurisdiction. Taking full advantage of these opportunities would lead to a federal judi-

¹⁹⁹ See generally *McCoid, A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707 (1976); see also *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 535 (1967) ("our view of interpleader means that it cannot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort").

²⁰⁰ See ALI Study, *supra* note 14, at 67-76, 375-410 (proposed 28 U.S.C. §§ 2371-2376).

²⁰¹ See Currie, *supra* note 4, at 32 n.150, 34.

²⁰² *Id.* at 29.

²⁰³ See Fed. R. Civ. P. 23. Though class actions are not out of the question in mass tort litigation, "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Advisory Committee Notes on 1966 Amendment to Rules, reprinted in 28 U.S.C. app., at 429 (1976). See generally 3B J. Moore, *supra* note 15, ¶ 23.02[2]-[18].

²⁰⁴ See 28 U.S.C. 1404(a) (1976).

²⁰⁵ See *id.* § 1407.

²⁰⁶ See Restatement (Second) of Judgments § 88(3) (Tent. Draft No. 3, 1976) (factor influencing decisions on issue preclusion from previous litigation with others can be whether "[t]he person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary"); *McCoid, supra* note 199, at 709-10, 714-24.

²⁰⁷ Confinement of the availability of the federal forum to litigation for which it seems especially appropriate—mainly, federal question cases and the limited citizenship-based jurisdictions discussed in this Section—could have side effects on the desirability of a general provision for nationwide service of process. If the jurisdiction of the federal courts were based on deliberate decisions about what kinds of cases it is especially desirable that they be available for, it would make all the more sense to have the broadest possible process in order to make sure they were indeed available. See also pp. 1004-06 *supra*.

²⁰⁸ Currie, *supra* note 4, at 49.

cial system different in important respects from the present one, but with characteristics that would be attractive to many—a system with authority to serve process nationwide and across national boundaries to the limits permitted by the Constitution, having uniform ancillary jurisdiction to dispose of matters not within its original competence but closely enough related to claims properly before it, and devoted primarily to the articulation and enforcement of our national law.

I do not offer the arguments presented here as dispositive ones that should clinch a case for abolition beyond possibility of reply. The reasons that others have urged for retaining diversity—continuing reality of some local prejudice, quality of federal court justice, broadening of federal judges' experience, and so on—are not directly refuted by the points explored in this Article. But this examination of abolition's effects, and of the opportunities it would create, yields an additional set of reasons for eliminating the general diversity jurisdiction.²⁰⁰ Especially if further reforms accompany or follow it, but even if they do not, abolition of diversity jurisdiction would probably constitute one of the greater steps since the adoption of the Federal Rules of Civil Procedure toward the goal rule 1 sets for civil litigation in the federal courts—"the just, speedy, and inexpensive determination of every action."

²⁰⁰ These benefits, moreover, would not result from measures short of abolition, such as the no-home-state-plaintiff approach urged by the the ALI, *see* ALI Study, *supra* note 14, at 12 (proposed 28 U.S.C. § 1302(a)) ("No person can invoke [general diversity] jurisdiction * * * in any district in a State of which he is a citizen"), and the Department of Justice, *see* H.R. 9123, 95th Cong., 1st Sess. § 1 (1977), *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 25 (1977) ("No person can invoke the [general diversity] jurisdiction * * * as a plaintiff in any district in a State of which he is a citizen."). That proposal would effect some reduction in the diversity caseload, but it would leave us with all the problems of complete diversity that trammel federal litigation and impede reforms. It might even add to the present burden of purely procedural litigation as parties maneuvered and countermaneuvered in efforts to evade or take advantage of a new limit on the still-available diversity jurisdiction. *See Currie, supra* note 4, at 45-46. Since its 1977 endorsement of the no-home-state-plaintiff approach, the Administration has changed its position and now supports the outright abolition of diversity jurisdiction. *See* President's Message to Congress on Proposed Legislation to Reform the Federal Civil Justice System, 15 Weekly Comp. of Pres. Doc. 342, 343-44 (Feb. 27, 1979).

(c) BY HON. ROBERT J. SHERAN AND HON. ROBERT F. UTTER

STATE CASES BELONG IN STATE COURTS

ROBERT J. SHERAN*
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INTRODUCTION***

During recent years members of the legal community have become increasingly concerned about the spiraling caseload of the federal courts. A perusal of the most recent available statistics demonstrates that this concern is justified. In the 1976 fiscal year 130,597 cases were filed in the 94 federal district courts, representing an 11.3% increase over filings in 1975 and an increase of 120% over cases filed in 1960.¹ The courts of appeals saw a similar mushrooming of activity. A record 18,408 new cases were docketed in 1976 which represents a 10.5% increase over fiscal year 1975.² Moreover, although the number of filings and terminations doubled between 1968 and 1976, the number of authorized judgeships for the courts of appeals remained constant at 97.³

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*** Since the preparation of this article, Congress has passed H.R. 7843, signed on October 20, 1978 as Public Law 95-486, which increases the number of federal district judgeships by 117 to a total of 516 and federal circuit judgeships by 35 to 132. While changing some of the statistics quoted below, this much needed legislation does not dispel the concerns leading us to advocate here the elimination of federal diversity jurisdiction. Simply, the federal caseload consistently grows faster than the willingness of Congress to create additional judgeships. New federal judges are needed just to handle the predictable increase of cases in subject areas by nature not assignable to the states. Nor does the passage of this legislation make the elimination of federal diversity jurisdiction an academic question—the last House of Representatives passed a diversity jurisdiction bill in full knowledge of the upcoming increases in federal judgeships, and it can be assumed that legislation eliminating or curtailing diversity jurisdiction will be considered by the next Congress.

1. 1976 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 169 (1977) [hereinafter cited as UNITED STATES COURTS 1976].

2. *Id.* at 152.

3. *Id.* In 1962 there were 78 authorized appeals court judgeships. The number was increased to 97 in 1968 and has remained at that figure since then. The judicial

Despite major efforts by the federal courts to streamline their activities and become more efficient,⁴ every year they find themselves further and further behind in clearing their dockets.⁵ In

caseload of the appeal court between 1962 and 1976, however, has more than kept pace with the increased number of judgeships. While the number of judgeships rose by only 24.4% between 1962 and 1976, the number of cases filed and terminated increased by 281.7% and 294.2% respectively during this period. *Id.* at 153. These figures demonstrate the complete failure of Congress to comprehend and deal adequately with the dilemma facing the federal courts.

4. Between 1970 and 1976, for example, the district courts increased their termination rate by 40% from 201 cases per authorized judgeship in 1970 to 276 cases per authorized judgeship in 1976. *Id.* at 152-53. Only the Second Circuit, however, closed more cases than were filed. *Id.* at 157.

5. This problem is graphically depicted in the following chart showing the increasing backlog of the federal district courts:

Fiscal year	Authorized judgeships	Civil Cases per authorized judgeship		
		Filed	Terminated	Pending on June 30
1940	183	190	204	161
1950	218	296	244	255
1960	245	242	252	250
1970	401	218	201	232
1974	400	259	244	268
1975	400	293	262	299
1976	399	327	276	351

UNITED STATES COURTS 1976, *supra* note 1, at 171. The courts of appeals face a similar problem.

Appeals Filed, Terminated, And Pending In The
U.S. Courts of Appeals Fiscal Years 1962 Through 1976

Fiscal year	Number of judgeships as of June 30	Appeals			Increase in appeals pending
		Filed	Terminated	Pending	
1962.....	78	4,823	4,167	3,031	656
1963.....	78	5,437	5,011	3,457	426
1964.....	78	6,023	5,700	3,780	323
1965.....	78	6,766	5,771	4,775	995
1966.....	88	7,183	6,571	5,387	612
1967.....	88	7,903	7,527	5,763	376
1968.....	97	9,116	8,264	6,615	852
1969.....	97	10,248	9,014	7,849	1,234
1970.....	97	11,662	10,699	8,812	963
1971.....	97	12,788	12,368	9,232	420
1972.....	97	14,535	13,828	9,939	707
1973.....	97	15,629	15,112	10,456	517
1974.....	97	16,436	15,422	11,470	1,014
1975.....	97	16,658	16,000	12,128	658
1976.....	97	18,408	16,426	14,110	1,982

1976, 327 civil cases were filed for each of the 399 authorized district court judgeships,⁶ which represents a 50% increase over 1970, the year in which the number of judgeships was last raised. And although the judges were able to increase their terminations by about 40% in this seven year period, the ever increasing number of cases filed meant that the pending caseload at the close of each year also rose.⁷ At the end of 1976 there were pending 351 civil cases per authorized judgeship, a rise of more than 50% over the pending caseload per judgeship in 1970.⁸ Similar gloomy results must be reported for the courts of appeals. In 1968, the last time the number of judgeships was increased, there were 6,615 cases pending; in 1976 there were 14,110 pending cases, an increase of 113.3% with no increase in the number of appellate judgeships.⁹

Many reasons have been advanced for this tremendous increase in litigation, some of which help to explain increased utilization of state courts as well as federal ones.¹⁰ The most fundamental factor seems to be the growth of population in the United States; the existence of more persons in the same amount of physical space is bound to create more conflicts, some of which end up in court. Thus, increases in personal mobility, in automobile ownership and use, in economic activities, and in the urban

Percent
change
1976 over

1962.....	—	281.7	294.2	365.5	—
1968.....	—	101.9	98.8	113.3	—
1975.....	—	10.5	2.7	16.3	—

Id. at 153.

6. It should be noted, however, that all the authorized judgeships are not filled because of the time it takes to find and confirm replacements. Thus, although there were 399 authorized district court judgeships, only 375 were filled on June 30, 1976. At the appeals court level only 94 of the 97 authorized positions were taken. *Id.* at 76.

7. One must also remember that the size of the pending caseload is a function not only of the number of filings but also of the complexity of the issues presented. The more complex the subject matter, the longer it takes to terminate the case. Thus, for example, although only 499 cases were filed under the National Environmental Protection Act, 42 U.S.C. §§ 4321-4347 (1970), in 1976, they are so complex that they consume a tremendous amount of judicial time. See Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 A.B.A.J. 938 (1974); UNITED STATES COURTS 1976, *supra* note 1, at 129.

8. UNITED STATES COURTS 1976, *supra* note 1, at 171.

9. *Id.* at 76.

10. The caseload of state courts has also risen dramatically. Chief Justice Robert J. Sheran reported in his 1978 State of the Judiciary address that 14% more matters were filed with the Minnesota Supreme Court in 1977 than 1976.

crime rate all help to raise the caseloads of the nation's courts, both state and federal.¹¹ This pattern has been aided by the increased affluence of many of our citizens which permits more people the luxury of litigation.¹² And for poor citizens the development of legal assistance for indigent criminal defendants as well as civil legal aid programs has permitted poor persons for the first time to litigate problems of concern to them.¹³ Finally, expanding constitutional concepts, such as equal protection and due process, have caused people to turn more and more to the courts for relief against perceived oppressions at the hands of both their government and private citizens.¹⁴

Aside from these general reasons for the increase in litigation, there are some specific causes of the soaring caseload in the federal courts. The most important of these factors is the creation by Congress of new federal statutory rights, primarily during the last decade, which can be vindicated in the federal courts.¹⁵ The sub-

11. *Judgeship Criteria*, AM. JUD. SOC'Y 3 (1973).

12. C. MCGOWAN, *THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES* 77 (1969).

13. *Id.* at 78-79. The Legal Services Program was created by the Economic Opportunity Amendments of 1966, Pub. L. No. 89-794, §211-1(b), 80 Stat. 1451, *as amended*, Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, §222, 81 Stat. 672 (repealed 1974). It now appears as the Legal Services Corporation, 42 U.S.C. §2996 (Supp. V 1975).

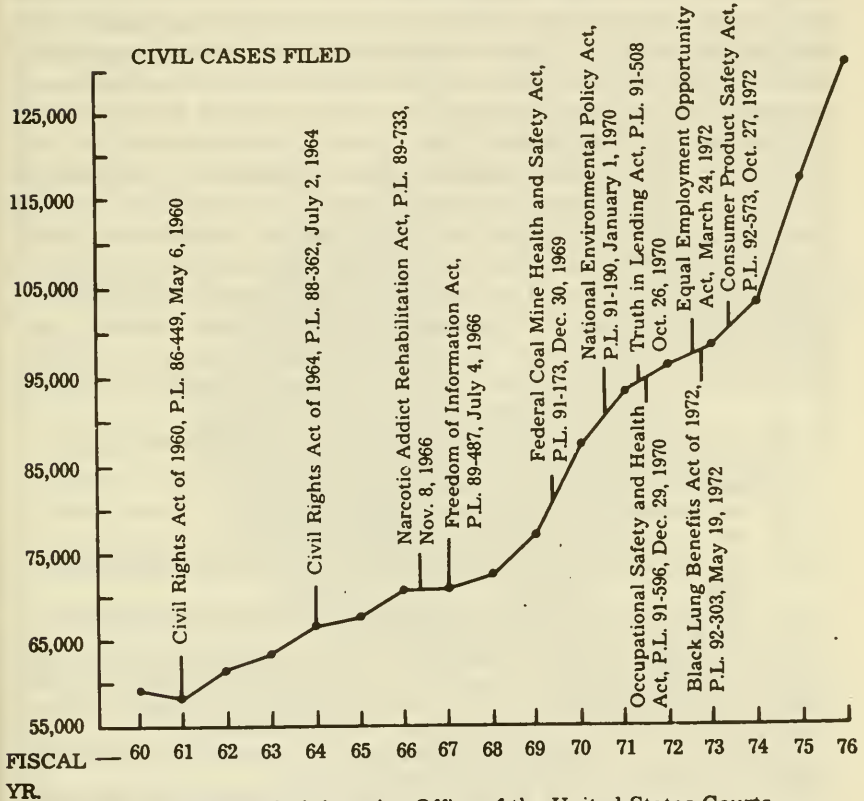
14. *Id.* at 79.

15. Judd, *supra* note 7, at 938. *See also* H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 22-26 (1973).

Each year the Administrative Office of the United States Courts prepares an "Impact Study of Major Statutes and Events on Criminal and Civil Caseload in the U. S. District Courts" that delineates the ways in which congressional activity affects the caseload of the federal courts. *See, e.g.*, UNITED STATES COURTS 1976, *supra* note 1, at 119-48. The following chart presents the problem graphically:

stantive¹⁶ and procedural¹⁷ rulings of the federal courts, especially

CHART 1
Civil Cases Filed in the U.S. District Courts
Fiscal Years 1960-1976



Source: Administrative Office of the United States Courts

Id. at 120.

Mr. Chief Justice Warren E. Burger has suggested that this kind of behavior by Congress is irresponsible and has called for an impact before any legislation is passed that will affect the caseload of the federal court. Burger, *1977 Report to the American Bar Association*, 63 A.B.A.J. 504, 505 (1977).

16. The major substantive changes include:

- (1) an increased role by the federal courts in the supervision of state criminal justice administration resulting both from the selective incorporation of the Bill of Rights into the due process clause of the Fourteenth Amendment and from the habeas corpus decisions from *Fay v. Noia*;
- (2) the utilization of the equal protection clause in school desegregation, reapportionment, discrimination on the basis of age, sex, economic status;

the Supreme Court, which have created new causes of action and liberalized access to the courts have also attracted much new litigation. Together, they have created the illusion that if a problem exists that cannot be remedied elsewhere, the federal courts will be able to fashion a solution.¹⁸

The problem of the spiraling federal caseload takes on added significance when one realizes that the trends and circumstances that produced more than a doubling of the federal caseload in the last sixteen years are likely to persist¹⁹ and maybe even accelerate unless drastic action is taken. For example, federal question cases accounted for the greatest portion of the increase in the federal caseload during this period,²⁰ and there is no indication that the number of cases in this category will not continue to increase in the future. Federal question cases now account for 53.9% of the total number of civil cases filed in the district courts (see Chart #1), and it is likely that filings in this area will continue to increase even if Congress passed no other statutes dealing with these or similar federal rights, an outcome that is extremely unlikely. Although antitrust litigation²¹ accounts for only 1.2 percent of the total civil filings, it is the most time-consuming category of cases,²²

(3) the revitalization of the Civil Rights Act of 1871, especially 42 U.S.C. §§ 1981, 1983, 1985(3) (1970).

17. Among the important procedural changes are:

- (1) the liberalization of the standing requirement;
- (2) the contraction of the political question category;
- (3) the permission of private parties to get review of administrative action;
- (4) the growth of class action suits following the revision of the Federal Rules of Civil Procedure in 1966.

18. The "Burger Court" has reiterated in numerous decisions that there are some problems for which *no* solution exists. See, e.g., *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975) ("We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues * * *").

This position is at variance with that taken by the "Warren Court" which went to lengths to extend the authority of the federal courts.

19. By emphasizing such concepts as standing, justiciability, equitable jurisdiction remedies, case and controversy, and comity and by narrowing the circumstances under which class actions are appropriate, the Supreme Court has curtailed federal jurisdiction. See notes 53-70 *infra* and accompanying text.

20. UNITED STATES COURTS 1976, *supra* note 1, at 122.

21. 15 U.S.C. §§ 1-31 (1970).

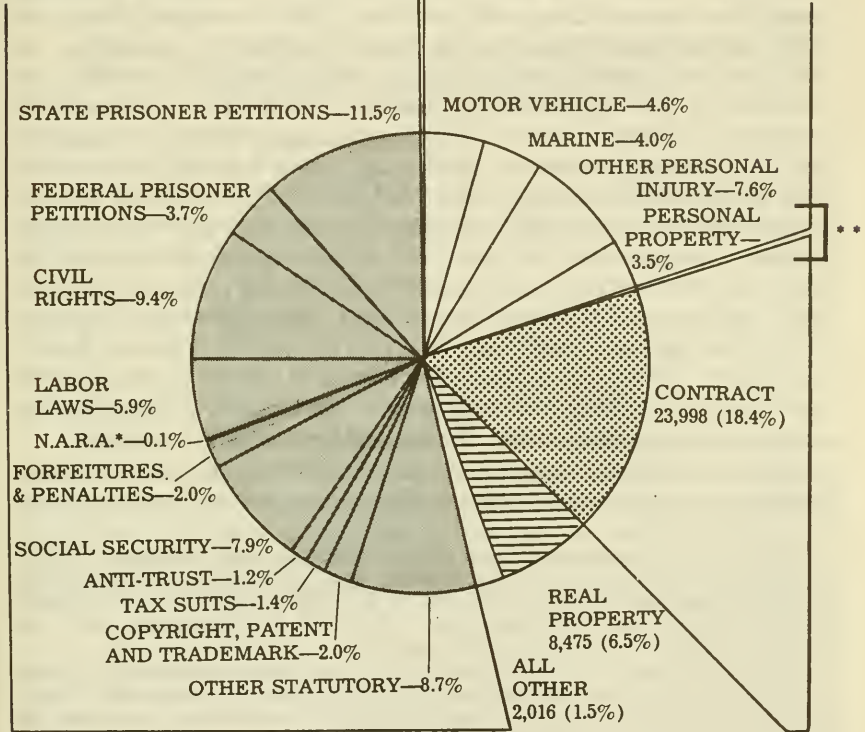
22. UNITED STATES COURTS 1976, *supra* note 1, at 125.

CIVIL CASES COMMENCED
United States District Courts
Fiscal Year 1976

TOTAL CIVIL CASES: 130,597

STATUTORY ACTIONS—70,372 (53.9%)

TORTS—25,736 (19.8%)



* Narcotic Addict Rehabilitation Act of 1966, Title III.

** Of these, 31,675, or 63.7%, were based on diversity of citizenship.

(Source: 1976 Annual Report of the Director of the Administrative Office of the United States Courts 122, 174 [1977].)

thus adding greatly to the over-all burden on the federal courts. Moreover, because it is part of our ethos that competition serves the public interest and should be stimulated by the federal government and by private attorneys-general, such litigation is likely to increase rather than decrease. Similar considerations apply to the

environmental cases²³ now reaching the federal courts in increasing numbers.²⁴

Civil rights cases, which represented almost 10% of all civil filings in 1976, is another area of federal question litigation that is likely to increase in the future. Since the establishment of the Equal Employment Opportunities Commission in 1972,²⁵ there has been a sharp increase in equal employment cases which now comprise nearly 43% of all civil rights suits filed.²⁶ With the recent shift from race to sex discrimination cases, it is likely that this trend of increased filings will continue. Social security cases, another employment-related area, have also risen in numbers. In 1976, they also accounted for almost 10% of the civil caseload, an increase of 77% above the number filed in 1975 and 189 percent above such filings in 1974.²⁷ The major cause of this increase was the burgeoning number of "black lung" cases²⁸ which represented 47% of all social security cases filed in 1976.²⁹ Since the federal government is only now beginning to deal with the "black lung" problem, litigation in this area should also continue to rise. Finally, the courts have seen a massive increase in prisoner petitions from both state and federal prisoners.³⁰ Although they only rose by 2.6% in the last fiscal year, they represent 15% of the total civil caseload.³¹ Prisoner petitioners increased by 810% since 1960,³² and they are unlikely to disappear³³ until massive changes are made in the administration of criminal justice in this country.

The increasing vigilance of private citizens in enforcing the rights protected under the Bill of Rights and federal statutory law

23. The most important of these include NEPA, 42 U.S.C. §§ 4321-4347 (1970); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. 1977); Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7642 (Supp. 1977); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (Supp. 1978); Oil Pollution Act, 33 U.S.C. §§ 1001-1016 (Supp. 1977).

24. In his report the Director anticipated an increase in enforcement of such environmental suits with the abatement of the recession. UNITED STATES COURTS 1976, *supra* note 1, at 129 (Ease with which such environmental suits can be brought; liberal interpretation by the courts of standing.).

25. 42 U.S.C. §§ 2000e-16-2000e-17 (Supp. 1973).

26. UNITED STATES COURTS 1976, *supra* note 1, at 129.

27. *Id.* at 127.

28. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-825 (Supp. 1978); Black Lung Benefits Act, 30 U.S.C. §§ 901-958 (Supp. 1973).

29. UNITED STATES COURTS 1976, *supra* note 1, at 127.

30. Between 1960 and 1976 the number of petitions by those incarcerated in state institutions soared by 1,624%. Most of these were habeas corpus petitions. During the same period the petitions of federal prisoners rose by 266%. UNITED STATES COURTS 1976, *supra* note 1, at 133.

31. They do not, however, consume 15 percent of the time of the district court judges because most of them are dismissed immediately as frivolous complaints.

32. UNITED STATES COURTS 1976, *supra* note 1, at 133.

33. Although recent decisions make it harder for prisoners to prevail, *see* note 58 *infra*, they do not seem to have stemmed the tide of such petitions.

is a positive development that must not be hampered. Nevertheless, unless we are able to provide a relatively speedy forum for the vindication of those rights, alternative methods of dispute resolution may be sought which are less compatible with our legal tradition.³⁴ For these reasons, drastic steps must be taken to free the courts of cases that either do not belong there or can be better resolved in some other fashion; only then will we be able to ensure that the courts remain available to decide the cases that need to be litigated there.³⁵

ALTERNATIVE MEANS FOR IMPROVING THE FLOW OF CASES IN THE FEDERAL COURTS

INCREASE SIZE OF FEDERAL JUDICIARY

The most logical solution to the problem of the overworked federal courts would be to simply increase the number of federal judges until the federal judiciary reached a size capable of handling the work coming into the courts. Legislation is currently making its way through Congress which will partly solve the problem,³⁶ but even when it is enacted, this legislation will not provide a sufficient number of additional judges to enable the federal courts to deal with their present and projected caseload problems.

For some reason Congress has historically been unsympathetic to the plight of the federal courts. Additional judgeships have been slow in coming, and the increases finally authorized have been minimal in light of the problems existing at the time each legislative increase has been passed. By the time new judgeships are authorized and filled, the caseload has already become

34. The two possibilities that come to mind are self-help and the imposition of a more authoritarian political system, neither of which is an acceptable alternative.

35. This position of course reflects the value judgment of the authors that the protection of the individual from overreaching by the government is one of the major functions of the courts, both state and federal. *Accord*, C. MCGOWAN, *supra* note 12; Johnson, *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455 (1977) [hereinafter cited as *The Role of the Judiciary*]; Johnson, *Observation: The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976) [hereinafter cited as *The Constitution and the Federal District Judge*].

36. H.R. 7843, which would increase the size of the federal judiciary by 140 judges passed the House of Representatives on February 7, 1978. This bill is slightly different from the Senate version which also mandated division of the Fifth Circuit Court of Appeals into two circuits. The bill has gotten bogged down in Conference, and it is not clear how it will actually look upon final enactment. Two of the major areas of controversy appear to be the reorganization of some of the circuits and the merit selection of district court judges. For a brief discussion of some of the problems involved see *State of the Judiciary and Access to Justice: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 309-10, 323-26 (1977).

unmanageable even with the additional judges that have then become available.

The usual reason given for maintaining the relatively small size of the federal judiciary is that any massive increase in its size would require the recruitment of more mediocre persons which, in turn, would dilute the high prestige in which the federal judiciary is held. This argument was first espoused by Felix Frankfurter in 1928 as part of his thesis that there was a need to limit the jurisdiction of the federal courts.³⁷

A powerful judiciary implies a relatively small number of judges. Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions * * *. It is idle to ratio the number of judges to changes in the wealth or population of the country. Subtle considerations of psychology and prestige play havoc with the mechanical notion that increase in the business of the federal courts can be met by increasing the number of judges.³⁸

Although this position has been accepted uncritically by legal commentators,³⁹ it does not ineluctably follow that size alone determines quality. In fact, in 1928 Frankfurter bemoaned the fact that the number of federal judges had by that date increased to 170, up from 115 in 1907 and 66 in 1884.⁴⁰ Yet, those who accept his argument in the 1970's are talking about 496 federal judges,⁴¹ a number which, by Frankfurter's standards, would likely include some mediocre members of the bar. Frankfurter's present-day counterparts, however, are afraid that if the number were to get beyond 496, the quality of federal judges would be bound to suffer and their prestige to drop drastically causing all Americans to lose confidence in the federal judiciary.

Moreover, if one were to accept Frankfurter's argument, then state judges, by the mere fact of their greater numbers, are bound to be inferior to their federal counterparts. If some state judges do in fact suffer by comparison, we contend that the reasons lie in the

37. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

38. *Id.* at 515-16.

39. See, e.g., Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203, 1212 & n.30 (1965); Clark, *A Commentary on Congestion in the Federal Courts*, 8 ST. MARY'S L.J. 407, 409 (1976).

40. Frankfurter, *supra* note 37, at 515-16.

41. UNITED STATES COURTS 1976, *supra* note 1, at 76.

methods of recruitment, compensation, and their differential degrees of independence from the other branches of government.⁴²

Congress' reluctance to increase the size of the federal judiciary probably stems more from its fear that the process would be irreversible. Once more judgeships are created, their holders get appointed to lifetime tenure, and it would be impossible to cut back the size of the judiciary at a later time, even if the caseload decreased sufficiently to warrant it. Thus, Congress prefers to move slowly and overly cautiously.

Another related reason for congressional delay in legislating more federal judges is the very political nature of the judicial appointment process. When Congress approves new judgeships, the political party in power gains an enormous political advantage by controlling the selection procedures. Since both federal district court and appellate judges have, in the past, been chosen overwhelmingly from the political party of the United States President,⁴³ it may be that the Republicans in the Congress would prefer to stave off any massive infusion of judges until there is a Republican in the White House.⁴⁴ Similarly, controversies over exactly which states will receive additional judgeships may operate to force those whose states are not among the chosen to vote against such a proposal even if they belong to the same political

42. See notes 216-227, 299-302 and accompanying text *infra*.

43. See, e.g., Goldman, *Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts*, 18 WEST. POL. Q. 755 (1963); Goldman, *Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts*, 1974 ARIZ. ST. L.J. 211; Goldman, *Judicial Appointments to the United States Court of Appeal*, 1967 WIS. L. REV. 186. See also Hall, *101 Men: The Social Composition and Recruitment of the Antebellum Lower Federal Judiciary*, 7 RUTGERS-CAMDEN L.J. 199 (1976); Halper, *Supreme Court Appointments: Criteria and Consequences*, 21 N.Y.L.F. 563 (1976).

Goldman notes that between 1920 and 1972 over 90% of the appointments to the federal appeals courts were affiliated with the political party of the appointing President. Goldman, 1974 ARIZ. ST. L.J. at 218; Goldman, 1967 WIS. L. REV. at 196 & n.32.

44. Merit selection of the federal judiciary may avoid this problem to a certain extent. President Carter has spoken out in favor of merit selection, and, by Executive Order, he has imposed a system of merit selection of appellate court judges. Exec. Order No. 11972, 42 Fed. Reg. 9659 (1977), *as amended* by Exec. Order No. 11993, 42 Fed. Reg. 27197 (1977). It should be noted, however, that this is just an experiment and that the Executive Order expires on December 31, 1978. Exec. Order No. 11972, sec. 8. Another shortcoming of Carter's approach is that he gets to choose the Commission that recommends five persons for the particular vacancy involved. Exec. Order No. 11993, sec. 3(a)(4). This means that the political pressures for appointing a member of the President's political party may still remain.

Because of the greater possibility of political patronage, merit selection of district court judges does not yet exist. While the Justice Department is in favor of such procedures at the district court level as well, much political opposition exists in Congress. Some members of Congress use their own form of merit selection by appointing selection committees to cover the various districts within their constituencies. See, 123 CONG. REC. S17123 (daily ed. Oct. 13, 1977). This, of course, does not necessarily remove the political element from the appointment process.

party as the President.⁴⁵

For all of these reasons, therefore, it is highly unlikely that Congress will, in fact, increase the size of the federal judiciary sufficiently for it to handle effectively its projected, much less its current, caseload. Although it is still necessary to work to achieve such an outcome, we must also focus our attention on other proposals to ease the caseload of federal judges at all levels.

DIVERSION OF CASES TO NON-JUDICIAL FORUMS

Another possible way to relieve the federal courts of some of their caseload would be to employ nonjudicial techniques of dispute resolution on a wider scale. Although the courts were originally hostile to this concept, and refused to enforce arbitration clauses in contracts on the ground that it impermissibly deprived them of their proper jurisdiction and thus was against public policy,⁴⁶ compulsory arbitration has become an accepted alternative to litigation in large numbers of situations.⁴⁷ Mediation and con-

45. Such controversies can be seen in the history of the most recent legislation to wind its way through Congress.

46. See, e.g., *Boughton v. Farmers Ins. Exch.*, 354 P.2d 1085, 79 A.L.R. 2d 1245 (Okla. 1960).

47. See *Lodges 700, 743, 1746, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 525 F.2d 237 (2d Cir. 1975) (strong congressional policy of encouraging arbitration of labor disputes); 9 U.S.C. §2 (1970).

One commentator argues that arbitration might not retain its advantages of privacy, speed and informality when it is utilized in other than a contractual context. McCree, *Address to 1977 Law Alumni Reunion Banquet, Georgetown University Law Center, reprinted in State of the Judiciary and Access to Justice: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 95th Cong., 1st Sess. 789 (1977). He is also concerned that arbitration proposals single out relatively small claims—the very areas affecting the powerless and poor that Congress thought were sufficiently important to exempt from the jurisdictional amount requirement of 28 U.S.C. § 1331. *Id.* at 5. A similar argument was made by Thomas Ehrlich, President of the Legal Services Corporation,

In the cause of easing the congestion in the Federal courts, we must not allow the perception, let alone the reality of secondclass or cheap justice for the poor. The poor have long sought effective access to the federal system of justice in general, and to the Federal courts in particular. We must not relegate their cases and their problems to institutions and tribunals that appear to be set up only for them and that other participants, the wealthy and the Government, are able to avoid.

State of the Judiciary and Access to Justice: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 49 (1977) (statement of Thomas Ehrlich).

Another way to lighten the workload of the federal district court judges is through the increased use of federal magistrates. The Federal Magistrates Act, 28 U.S.C. §§ 631-639 (Supp. 1978) was passed in 1968 to assist federal district court judges in this regard. Under 28 U.S.C. § 636(B) (1), as amended by Pub. L. No. 94-577 (1976), a magistrate can be designated to hear any pretrial matter pending before the court and he can conduct hearings, take evidence and make recommendations regarding post-trial relief and habeas corpus petitions. During 1976 the

ciliation are other nonjudicial methods of dispute resolution that have increased in popularity in recent years,⁴⁸ and Congress should encourage their utilization whenever possible.

The advantages of these nonjudicial alternatives to litigation stem from the greater flexibility which they permit, the speed with which they operate, and the substantial savings in costs which flow from their utilization. Nevertheless, because of the belief that judges are generally the most competent decisionmakers, it is unlikely that these advantages of nonjudicial resolution will, without added incentives, result in the voluntary removal of large numbers of cases from the courts. Congress can assist in this regard by requiring potential parties to a lawsuit to employ one of these nonjudicial methods as either an alternative or a prerequisite to utilization of the federal courts.

Closely analogous to the utilization of nonjudicial forms of dispute resolution is the requirement that parties exhaust their administrative remedies⁴⁹ before they are permitted access to the courts.⁵⁰ It is hoped that the utilization of administrative mechanisms will resolve the problem to the satisfaction of the complaining party, making judicial intervention unnecessary. The exhaustion rationale also assumes that once legitimate complaints are brought to the attention of the agency, it will move to correct the causes of the problems on its own initiative.⁵¹ To the extent

magistrates reviewed 1,480 social security cases and 8,231 prisoner petitions. UNITED STATES COURTS 1976, *supra* note 1, at I-76, 8.

48. The federal government has long had a policy favoring mediation and conciliation in labor disputes. The Federal Mediation and Conciliation Service was established in 1947 as part of the National Labor Relations Act to arbitrate labor disputes. 29 U.S.C. § 172 (1970). Other specific policies of conciliation exist in various federal statutes. Thus, under the Age Discrimination in Employment Act, before the Secretary of Labor can bring a suit on behalf of a litigant, he must attempt conciliation with the employer. 29 U.S.C. § 626(b) (1976). The Commissioner of the Equal Employment Opportunities Commission has a similar duty. 42 U.S.C. § 2000e-4(g)(4) (Supp. 1972). Finally, the Secretary of Housing and Urban Development is given the power to engage in conciliatory activities that further the provisions of the Fair Housing Act. 42 U.S.C. § 609 (1970). Obviously, all these activities keep some cases from ever reaching the federal courts.

49. Although the exhaustion procedures are judicial in character, they have been analogized to nonjudicial decisionmaking because they do not involve judicial officers. The hearing examiners before whom disputed cases are heard are federal civil service workers employed by the various administrative agencies. Their activities are governed by the provisions of the Administrative Procedure Act. *See* Administrative Procedure Act § 11, 5 U.S.C. §§ 3305, 3105, 3344, 5362, 7521 (1970).

50. This requirement is imposed by statute as well as by judicial decision. Recently, the Supreme Court has intimated that exhaustion of administrative remedies might be required before a suit under section 1983 can be commenced. *See* *Ingraham v. Wright*, 430 U.S. 651 (1977). *See also* Paul V. Davis, 424 U.S. 693 (1976); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

51. Opponents of the exhaustion requirement find it time consuming and expensive, especially since the assumptions behind the rationale are often incorrect.

that this assumption reflects reality, the expansion of exhaustion requirements should relieve the courts of some of the cases seeking review of agency decisions.

Even if all of the assumptions regarding the efficacy of these nonjudicial forms of dispute resolution prove correct, however, their added utilization will probably not have a noticeable impact on the federal caseload. They can serve only as a supplement to, not as an alternative for, other action of a more drastic nature.

SUPREME COURT CONGRACTION OF THE FEDERAL CASELOAD THROUGH THE CASE-BY-CASE DECISIONMAKING PROCESS

In the face of congressional failure to take meaningful steps to relieve the congestion in the federal courts, the United States Supreme Court has made some changes of its own whose effect will be a decrease in federal litigation. Perhaps in response to the charges of persons like Judge Friendly that previous decisions of the Supreme Court have done much to overburden the federal courts by permitting new causes of action and relaxing procedural hurdles,⁵² the Supreme Court in its recent decisions has attempted to decrease litigants' utilization of the federal courts.⁵³ By

Since many agencies are committed to their procedures, exhaustion simply draws out the time and energy which must be expended before meaningful relief is possible. Some of these problems are eloquently discussed by Judge Johnson, Chief Judge of the United States District Court for the Middle District of Alabama, in the context of prison reform and the conditions of confinement of the mentally retarded. Johnson, *Observation: The Constitution and the Federal District Judge*, *supra* note 35; Johnson, *The Role of the Judiciary*, *supra* note 35. But see UNITED STATES COURTS 1976, *supra* note 1, at 187 (federal habeas corpus petitions declined by 15.5 percent probably in response to the initiation of a new procedure in the federal prisons to handle complaints internally).

52. H. FRIENDLY, *supra* note 15, 18-21; Friendly, *Federalism: A Foreward*, 86 YALE L.J. 1019, 1027-28 (1977).

53. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) [hereinafter cited as *Myth of Parity*]; Neuborne, *The Procedural Assault of the Warren Legacy: A Study of Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977) [hereinafter cited as *Procedural Assault*]; Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneekloth v. Bustamonte*, 1975 WIS. L. REV. 484; Note, *Stone v. Powell and the New Federalism: A Challenge to Congress*, 14 HARV. J. LEGIS. 152 (1976); Comment, *Equitable Restraint: The Extension of Younger to Civil Actions*, 46 U. CIN. L. REV. 220 (1977); Comment, *Restriction of Access to Federal Courts: The Growing Role of Equity, Comity, and Federalism*, 50 TEMPLE L.Q. 320 (1977); *State of the Judiciary and Access to Justice: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 605 (1977) (prepared statement of the Society of American Law Teachers) [hereinafter cited as *Society of American Law Teachers*]; *State of the Judiciary and Access to Justice*, *supra*, at 11 (statement of Ralph Nader); *State of the Judiciary and Access to Justice*, *supra*, at 112 (statement of Burt Neuborne).

In an attempt to get around these restrictive holdings and ensure that litigants receive the protections they desire, some commentators have urged that state supreme courts take a more activist role in interpreting their state constitutions. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Ziegler, *Constitutional Rights of the Accused—Developing*

stressing the requirements of standing,⁵⁴ justiciability,⁵⁵ case and controversy,⁵⁶ and comity;⁵⁷ by making it more difficult to win habeas corpus⁵⁸ and section 1983⁵⁹ actions; and by emphasizing "federalism,"⁶⁰ the Supreme Court has narrowed access to federal

Dichotomy Between Federal and State Law, 48 PA. B.Q. 241 (1977); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Note, *Expanding Criminal Procedural Rights under State Constitutions*, 32 WASH. & LEE L. REV. 909 (1976); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976); Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63 (1977).

54. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). See also *Neuborne, Procedural Assault*, *supra* note 53, at 551-55; *Society of American Law Teachers, supra* note 53, at 702-08.

55. By revitalizing principles of comity and federalism, especially when the result is to force the dismissal of a lawsuit originally filed in the federal courts, the Supreme Court is saying, in effect, that these are not justiciable issues in the federal courts. See note 57 *infra*.

56. The elimination of implied causes of action arising out of violations of administrative and criminal laws is a form of restricting the case or controversy requirement as a precondition to federal jurisdiction over the issue. This seems to be what the Supreme Court has done in such cases as *National RR Passenger Corp. v. National Ass'n of RR Passengers*, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 413 (1975); *Cort v. Ash*, 422 U.S. 66 (1975).

57. In *Younger v. Harris*, 401 U.S. 37, 44 (1971), the Court defined comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." This concept, which involves the expansion of principles of exhaustion and abstention, has been applied in such later cases as *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977). See *Neuborne, Procedural Assault, supra* note 53, at 556-68; *Society of American Law Teachers, supra* note 53, at 712-16; Comment, *Equitable Restraint, supra* note 53; Comment, *Restriction of Access to Federal Courts, supra* note 53. Comity can involve either putting off a federal court's jurisdiction until the state courts get a chance to construe the constitutionality of the challenged action, see, e.g., *Bellotti v. Baird*, 428 U.S. 132 (1976), or the requiring the entire dismissal of the federal court action, see, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). See *Developments in the Law, supra* note 50, at 1136.

58. *Stone v. Powell*, 428 U.S. 465 (1976). See *Neuborne, Procedural Assault, supra* note 53, at 568-72; *Society of American Law Teachers, supra* note 53, at 716-19; Note, *Stone v. Powell, supra* note 53; *Tushnet, supra* note 53.

59. *Rizzo v. Goode*, 423 U.S. 362 (1976) (made section 1983 unavailable when it was needed); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors absolutely immune from liability for damages in 1983 action); *Paul v. Davis*, 424 U.S. 693 (1976) (refused to find constitutional violation; only state defamatory action available); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (federal courts not to interfere if state enforcement action is pending). In *Aldinger v. Howard*, 427 U.S. 1 (1976) the Court held that a municipality was not a person for purposes of 1983 suits. This position has been recently modified. *Monell v. Department of Social Services*, 98 S. Ct. 2018 (1978).

60. See text accompanying notes 67-68 *infra*. See also *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years

courthouses for many would-be litigants.⁶¹ It is doubtful, however, whether these developments are the most efficacious way in which to deal with the problem of federal court congestion,⁶² because some of those who are unable to use the federal courts are the very persons who most need protection⁶³ and whose complaints may not be sympathetically received in many state court-

past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law . . ."; *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976) ("[P]rinciples of federalism which play such an important part in governing the relationship between federal courts and state governments . . . likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments . . .").

61. This pattern of limiting access to the federal courts has been pervasive, according to the Society of American Law Teachers.

Although the pattern is not uniform, it is clear enough; the Supreme Court is making it harder and harder to get a federal court to vindicate a broad range of federal constitutional and other legal rights . . .

That there is indeed a pattern, and that it is more than accidental, seems clear from the scope and pervasiveness of the phenomenon. Class actions, standing to sue, federal review of constitutional claims in state criminal and civil proceedings, attorney's fees, [the fashioning of] meaningful remedies—in these and other contexts, the Supreme Court has sharply restricted the federal courts' power to protect basic rights.

SOCIETY OF AMERICAN LAW TEACHERS, SUPREME COURT DENIAL OF CITIZEN ACCESS TO FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTS: THE RECORD OF THE BURGER COURT 2-3 (October 1976).

The Court has also reduced federal protection of individual rights by contracting the substance of these constitutional rights as well. See, e.g., cases cited in Comment, *Protecting Fundamental Rights in State Courts*, *supra* note 53, at 63 n.1.

62. As Mr. Justice Brennan noted recently:

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.

Brennan, *supra* note 53, at 498.

63. Although the state courts have also had jurisdiction over federal question litigation, federal judges are better able to ensure even-handed administration of justice in this area because of their insularity from local popular pressures and their greater expertise in interpreting complex constitutional and statutory issues. See *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 210 n.41 (1974); notes 216-27 and accompanying text *infra*. Some commentators have also argued that federal judges feel more of a responsibility to abide by the constitutional interpretations of the United States Supreme Court than their state counterparts. See Neuborne, *Myth of Parity*, *supra* note 53; Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959-60 (1976).

houses in this country.⁶⁴

The contours of the doctrine of "our federalism" were described by Mr. Justice Black in *Younger v. Harris*,⁶⁵ in which the Court held that principles of equity, comity, and federalism required federal courts to abstain from enjoining, under section 1983, a pending state criminal prosecution unless the petitioner were able to demonstrate bad faith on the part of the prosecutor or immediate, irreparable harm to himself from a continuation of the prosecution.⁶⁶ The Court spoke of the need for

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.⁶⁷

The Court then went on to describe "our federalism" as follows:

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts* * *. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.⁶⁸

The effect of *Younger* and its progeny⁶⁹ has been to strengthen the belief that state, rather than federal, courts are the proper fo-

64. This was the conclusion reached by the American Law Institute in its study of the division of business between the state and federal courts. ALLI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 166 (1969). See also McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250, 263-64 (1974); Neuborne, *Myth of Parity*, *supra* note 53; Stolz, *supra* note 63, at 960; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1060-63 (1970). A recent student note summed up the issue succinctly:

This federal interest theoretically can be protected by the states as well as by the federal government In its reasoning, [however,] the Court ignores the differences in institutional setting and outlook of the state and federal courts. It ignores the inadequacy and unavailability of state remedies' as well as the lack of responsiveness of state institutions. Finally it ignores the basic assumptions that have led to the provision for inferior federal courts in the first instance

Until it can be shown with greater certainty that state forums will give sufficient protection to federal rights, Congress should act to maintain the availability of the federal courts for vindication of those rights.

Note, *Stone v. Powell and the New Federalism*, *supra* note 53, at 170-71.

65. 401 U.S. 37 (1971).

66. *Id.* at 43-57.

67. *Id.* at 44.

68. *Id.*

69. See cases cited in note 57 *supra*. See also Note, *Stone v. Powell and the*

rum for the initial determination of federal constitutional rights.⁷⁰ This may be inconsistent with the position taken by Congress when it granted the federal courts federal question jurisdiction in 1875.⁷¹ As Senator Nelson commented recently on the floor of the Senate,

In my view, the assertion of constitutional rights—and the existence of a federal forum to review those claims—is vitally important for the society, as well as for the petitioner. Our willingness to use scarce judicial resources in this way reflects again the high priority this society places on constitutional liberties and individual freedom. If this society no longer values the constitutional rights to the same degree, that judgment should be reflected by the representatives of the people—Congress—through a decision to restrict the habeas jurisdiction of the federal courts. Congress is also the only body which can address the rising caseload in the federal courts in a systematic way and make some basic judgments about how scarce judicial resources should be allocated.⁷²

Under article III, section 1 of the Constitution⁷³ it is Congress which has the power to define the limits of jurisdiction of the federal courts.⁷⁴ Case-by-case decisionmaking is not the best method for determining what sort of cases belong in the federal courts. The Court is not equipped to gauge, or expected to measure the long-term administrative implications of its decisions.⁷⁵ The legislative process is better able not only to seek the viewpoints of all who will be affected by the enactment of statutes but attempt to

New Federalism, *supra* note 53; Comment, *Equitable Restraint*, *supra* note 53; Comment, *Restriction of Access to Federal Courts*, *supra* note 53.

70. The result of this position, however, may be to close the federal courts entirely to these claims because once they have been litigated in state court, principles of *res judicata* may bar their relitigation in a federal forum. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975). See also note 57 *supra*.

71. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470.

72. 121 CONG. REC. S17,848 (daily ed. Oct. 1, 1976) (remarks of Senator Nelson).

73. U.S. CONST. art III, § 1. Article III, section 1 states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior federal courts as the Congress may from time to time ordain and establish."

74. See Reddish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975). Mr. Justice Brennan, in his dissent in *Stone v. Powell*, 428 U.S. 465, 515 (1976) (Brennan, J., dissenting), argued that the majority's approach to the issue was "an obvious usurpation of Congress' Article III power to delineate the jurisdiction of federal courts." A similar position is taken in Comment, *Equitable Restraint*, *supra* note 53, at 231 ("Although state courts may be fully competent to adjudicate federal claims, the plaintiff's right to a federal forum has been guaranteed by Congress and should not arbitrarily be brushed aside due to general notions of equity, comity and federalism. A continuation of the present trend soon will destroy the right Congress has seen fit to provide for its constituents.").

75. Mr. Justice Brennan has argued that the Court is antagonistic to the interests themselves raised by plaintiffs in these lawsuits rather than merely to the perceived overuse of the federal courts. *Stone v. Powell*, 428 U.S. 465, 536 (1976)

accommodate conflicting positions in the drafting of the statutes themselves. Thus, in an area as sensitive as access to the federal courts, Congress should make the ultimate determinations.

CONGRESSIONAL DIVERSION OF PART OF THE WORKLOAD OF THE FEDERAL COURTS

Since the alternatives discussed earlier are insufficient, in order to provide meaningful relief to the federal courts, some theory must be found which would permit the massive diversion of cases to other tribunals. The task of distinguishing between the cases that logically belong in Article III courts⁷⁶ and those that can be handled efficiently and competently elsewhere, however, is not a simple one, even though much has been written on the subject,⁷⁷

(Brennan, J., dissenting); *Warth v. Seldin*, 422 U.S. 490, 520 (1976) (Brennan, J., dissenting); *Judice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting) ("[T]he Court in a series of decisions . . . has shaped the doctrines of jurisdiction, justiceability and remedy so as increasingly to bar the federal courthouse door to litigants with substantial federal claims These decisions have in common that they have been rendered in the name of federalism. But they have given this great concept a distorted and disturbing meaning. Under the banner of vague, undefined notions of equity, comity and federalism, the Court has embarked upon the dangerous course of condoning both isolated . . . and systematic . . . violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly reflect the nature of our federalism.") See also Brennan, *supra* note 53, at 503-04; Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1159-60 (1977); Society of American Law Teachers, *supra* note 61. Fiss strikes a similar ominous note:

I wonder whether 'federalism' is itself being used as a proxy for another set of values. I suspect that it is. I suspect that at the heart of *Rizzo*—and at the heart of the progeny of 'Our Federalism'—is more than a concern that federal courts should not interfere in state agencies. I suspect that at the heart of *Rizzo* there is a new version of *laissez-faire*—one specially tailored to the welfare state. It consists of a desire to insulate the status quo from judicial interference, regardless of whether the protected institution is a judicial system, legislature or administrative agency. I suspect that the overarching spirit of the Burger Court is a hostility toward the activism of judges, not just federal judges. 'Federalism' is but one handle available to the Supreme Court for curbing some of the more ambitious—more idealistic—projects of its own judges.

Fiss, *supra*.

Even if this is not true, its decisions discourage federal litigation because of overly broad interpretations rendered by lower federal courts of their lack of power to deal with these issues. See Comment, *Equitable Restraint*, *supra* note 53.

76. Article III courts exist to protect federal rights. It is argued later that Article III courts need to perform different functions today than in the period when they were established. Thus, the cases that logically belong in the federal courts today are not the ones that the Founders would have put there. See notes 179-190 and accompanying text *infra*.

77. This question has been a controversial one from the very beginning of this nation's history. A number of arguments in the Federalist Papers centered around the division of jurisdiction between state and federal courts, and it was of burning interest to the first Congress and the early history of the United States Supreme Court. Congressional interest in this question was revived briefly after the Civil War, but it was not until the post World War II period that real state-federal friction became of critical importance. The issue around which it coalesced was the civil rights movement which has permanently affected the balance between them. The

and any discussion of alternative forums inevitably raises questions about constitutional interpretations⁷⁸ and the role that the principle of federalism should play in modern American life.⁷⁹

It is clear that there are a number of possible ways to divert a significant proportion of the federal caseload to other judicial tribunals in which they can receive equal or superior treatment to what is possible from the presently overburdened federal judges. Cases can be siphoned off into either specialized courts⁸⁰ or state trial courts of general jurisdiction.⁸¹

The concept of specialized judicial decisionmaking has recently gained attention as commentators have grappled with possible ways to revise the structure of the federal appellate courts.⁸² In order to relieve the United States Supreme Court, which is no longer able to give its burgeoning caseload the consideration it deserves,⁸³ a number of legal commentators and judges have called on Congress to create a National Court of Appeals below the Supreme Court but above the present circuit courts of appeals.⁸⁴ A variant of this approach would be the establishment of an intermediate court to review state and federal criminal convictions.⁸⁵ Such a court would greatly relieve the federal district courts of their habeas corpus review function which presently accounts for about 15% of their total civil caseload.⁸⁶

Another possibility would be to utilize more efficiently the ex-

two mechanisms that have been used most frequently to change this balance are the commerce clause and the fourteenth amendment.

Modern scholarly interest in the question of appropriate forums seems to have begun in the 1920's. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1927); Frankfurter, *supra* note 37. See also Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71 (1933); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216 (1948); Doub, *Time for Re-evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243 (1958).

78. See, e.g., H. FRIENDLY, *supra* note 15; Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964).

79. This principle underlies recent decisions limiting the jurisdiction of the federal courts. Cf. Fiss, *supra* note 75, at 1103, 1159-60.

80. See, e.g., H. FRIENDLY, *supra* note 15, at 129-38, 153-96.

81. See notes 268-322 and accompanying text *infra*.

82. See, e.g., COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975); FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972); Symposium, 59 CORNELL L. REV. 571 (1974).

83. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Courts Do Not Do*, 60 CORNELL L. REV. 335 (1975); Stolz, *supra* note 63; Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change*, 59 CORNELL L. REV. 616 (1974).

84. See, notes 82-83 *supra*.

85. Haynesworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973); Haynesworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974).

86. See note 30 and accompanying text *supra*.

isting Article I courts⁸⁷ by giving them exclusive jurisdiction over tax and patent matters.⁸⁸ Although these cases do not comprise much of the current federal district court caseload,⁸⁹ they are specialized matters requiring a certain amount of expertise which, it is argued, makes them amenable to such specialized treatment.⁹⁰

The most popular suggested forum to receive more federal cases, however, is the state court.⁹¹ As Mr. Chief Justice Warren Burger recently noted in his 1977 State of the Judiciary message to the American Bar Association, there are more than ten times as many state trial court judges as there are federal district court judges.⁹² Thus, in theory, by spreading the redistributed caseload

87. The major difference between Article I and Article III courts is that judges in the former do not have the same life tenure as those in the latter. It is unlikely that this distinction should make any difference in the outcomes of the kinds of cases that are likely to be tried in Article I tribunals.

88. See, e.g., H. FRIENDLY, *supra* note 15, at 153-96.

89. UNITED STATES COURTS 1976, *supra* note 1, at 174. Together they represent only 3.4% of the total civil caseload at the district court level. See Chart 1 at note 15 *supra*.

90. H. FRIENDLY, *supra* note 15, at 153-96.

91. ALI, *supra* note 64; H. FRIENDLY, *supra* note 15; MCGOWAN, *supra* note 12; Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & THE SOCIAL ORDER 557; Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Burger, *supra* note 15; Clark, *supra* note 39; Frankfurter, *supra* note 37; Fraser, *Proposed Revision of the Federal District Courts*, 8 VAL. U. L. REV. 189 (1974); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Friendly, *supra* note 77; Johnson, *The Constitution and the Federal District Court Judge*, *supra* note 35; Lay, *States' Rights: The Emergence of a New Judicial Perspective*, 22 S.D.L. REV. 1 (1977); Comment, *Equitable Restraint*, *supra* note 53; Comment, *Protecting Fundamental Rights in State Courts*, *supra* note 53; Comment, *Restriction of Access to Federal Courts*, *supra* note 53; Note, *Stone v. Powell and the New Federalism*, *supra* note 53.

92. He stated that there were 4000 state court judges as compared to 400 federal district court judges. Burger, *supra* note 15, at 504. He was limiting himself to those state judges whose caseload would be similar under state law to that of the federal district court judges since there are many more state court judges altogether than 4000.

NUMBER OF JUDGES

State or other jurisdiction	Appellate courts			Major trial courts			
	Court of last resort	Inter- mediate appellate court	Chancery court	Circuit court	District court	Superior court	other trial courts
Alabama	9	8	—	108	—	—	—
Alaska	5	—	—	—	—	17	—
Arizona	5	12	—	—	—	67	—
Arkansas	7	—	26	29	—	—	—
California	7	56	—	—	—	522	—
Colorado	7	10	—	—	94	—	—
Connecticut	6	—	—	—	—	45	—
Delaware	3	—	3	—	—	11	—
Florida	7	20	—	263	—	—	—
Georgia	7	9	—	—	—	86	—
Hawaii	5	—	—	13	—	—	—
Idaho	5	—	—	—	24	—	—
Illinois	7	34	—	360	—	—	250(a)
Indiana	5	9	—	88	—	78	4
Iowa	9	—	—	—	292(b)	—	—

evenly among the state courts,⁹³ large numbers of cases could be

Kansas	7	(c)	—	—	64	—	—
Kentucky(d)	7	—	—	83	—	—	—
Louisiana	7	29	—	—	125	—	—
Maine	6	—	—	—	—	14	—
Maryland	7	12	—	63	—	—	22
Massachusetts	7	6	—	—	—	46	—
Michigan	7	18	—	138	—	—	23
Minnesota	9	—	—	—	72	—	—
Mississippi	9	—	25	24	—	—	—
Missouri	7	22	—	112	—	—	—
Montana	5	—	—	—	28	—	—
Nebraska	7	—	—	—	45	—	—
Nevada	5	—	—	—	25	—	—
New Hampshire	5	—	—	—	—	13	—
New Jersey	7	22	—	—	—	120	103
New Mexico	5	5	—	—	32	—	—
New York	7	24(e)	—	—	—	—	257
North Carolina	7	9	—	—	—	55	—
North Dakota	5	—	—	—	19	—	—
Ohio	7	38	—	—	—	—	296
Oklahoma	9	9(f)	—	—	185	—	—
Oregon	7	6	—	70	—	—	—
Pennsylvania	7	14	—	—	—	—	285
Rhode Island	5	—	—	—	—	15	—
South Carolina	5	—	—	16	—	—	—
South Dakota	5	—	—	36	—	—	—
Tennessee	5	16(f)	26	54	—	—	27
Texas	9	47(f)	—	—	220	—	—
Utah	5	—	—	—	21	—	21
Vermont	5	—	—	—	—	7	—
Virginia	7	—	—	103	—	—	—
Washington	9	12	—	—	—	100	—
West Virginia	5	—	—	50	—	—	—
Wisconsin	7	—	—	53	—	—	126
Wyoming	5	—	—	—	13	—	—
District of Colum- bia(g)	9	—	—	—	—	44	—
Guam	3	—	—	—	—	5	—
Puerto Rico	8	—	—	—	—	89	—

(a) Associate Judges of circuit court.

(b) A unified system with 83 District Court Judges who possess the full jurisdiction of the court. An additional 19 District Associate Judges, 19 full-time Judicial Magistrates, and 169 part-time Judicial Magistrates have limited jurisdiction.

(c) New court of appeals takes effect January 1977.

(d) See footnote (d) on Table 1.

(e) Twenty-four justices permanently authorized; in addition, as of October 1975, 18 justices and certificated retired justices had been temporarily designated.

(f) In Oklahoma, there are 3 judges on the Court of Criminal Appeals and 6 on the Court of Appeals. In Tennessee there are 9 judges on the Court of Appeals and 7 members on the Court of Criminal Appeals. In Texas there are 5 judges on the Court of Criminal Appeals and 42 on the Court of Civil Appeals.

(g) Information reflects 1974 survey. Later information not available.

diverted—which would have a significant effect on the caseload of each federal judge—without overly burdening the state judges who would each receive only one tenth of the diverted cases.

By far the hardest problem in this redistribution process is to isolate those kinds of cases to divert. Aside from ensuring that the choices of forums are based on logical principles, the number of cases diverted must be large enough so that, along with some of the other proposals discussed previously,⁹⁴ the federal caseload is reduced to a manageable level.

The proposal which would result in the most massive redistribution of the caseload of the federal courts is that advanced by Judge Henry Friendly.⁹⁵ Long a proponent of reducing the heavy burden on the federal courts,⁹⁶ his more recent writings on the subject foresee the transfer of almost the entire federal caseload to the states.⁹⁷ He would eliminate from the federal dockets not only diversity jurisdiction,⁹⁸ but state prisoner habeas corpus cases,⁹⁹ numerous criminal cases,¹⁰⁰ and much federal question litigation such as environmental protection,¹⁰¹ personal injury actions cre-

93. It is of course not true that the caseload would be so evenly distributed. Rather, it is more likely that because of venue provisions in both state and federal statutes, the transfer would be from urban, congested federal courts to urban state courts which also tend to be the most overburdened at the state level. Frank, *Let's Keep Diversity Jurisdiction*, 9 THE FORUM 157, 162 (1973); see notes 308-314 and accompanying text *infra*.

94. See notes 36-51 and accompanying text *supra*.

95. H. FRIENDLY, *supra* note 15. Aside from diverting most of the federal caseload to state courts, he would also transfer such matters as patents, taxes, administrative appeals, and antitrust into specialized federal courts where they could be decided quickly and more efficiently than in the federal district courts of general jurisdiction. *Id.* at 153-96.

96. He wrote his first article on the subject in 1927 at which time he prophesized that Congress would soon act to curtail federal jurisdiction. Friendly, *supra* note 77.

97. Aside from his book which was published in 1973, see Friendly, *supra* note 91; Friendly, *Of Voting Blocs, and Cabbages and Kings*, 42 U. CIN. L. REV. 673 (1973); Friendly, *supra* note 52. For critiques of his position, see Maroney, "Averting the Flood": Henry J. Friendly and the Jurisdiction of the Federal Courts—Part I, 27 SYRACUSE L. REV. 1071 (1976); Frank, *Book Review*, 59 A.B.A.J. 466 (1963).

98. H. FRIENDLY, *supra* note 15, at 140-41.

99. *Id.* at 104-07.

100. *Id.* at 55-61. Other commentators have long advocated this particular reform. See, e.g., Clark, *supra* note 39, at 409 & n.7; Frankfurter, *supra* note 37, at 516. Clark specifies the following local crimes which should be eliminated from federal criminal statutes: drunk driving, 18 U.S.C. § 13 (1970); larceny and theft, 18 U.S.C. §§ 641-644 (1970); automobile theft, 18 U.S.C. §§ 2312-2315 (1970); prostitution, 18 U.S.C. §§ 2421-2424 (1970); drug abuse, 21 U.S.C. §§ 841-843 (1970). Clark, *supra* at 409 & n.7.

The overlapping of federal and local crimes not only adds cases to the federal docket which could just as easily be handled in state courts, but it creates potentially serious problems of double jeopardy and the spectre of differential treatment of persons similarly situated when the sentences imposed under local statutes are greatly different from that under federal law for the same offense.

101. H. FRIENDLY, *supra* note 15, at 111-12.

ated by federal statutes,¹⁰² and most section 1983 suits.¹⁰³

Without dwelling on the merits of the various forms of federal actions which Judge Friendly would divert, we believe his proposal is too drastic. It would remove from the federal courts almost its entire caseload¹⁰⁴ as well as its *raison d'être*. Instead, we start with the assumption that the federal courts are the proper forum for federal question cases.¹⁰⁵ What can and should be pared from their caseload are the cases involving issues of general common law,¹⁰⁶ namely cases that reach the federal courts by alleging diversity of citizenship between the parties.¹⁰⁷

It is our belief that cases based on diversity of citizenship jurisdiction clog up the federal courts with large numbers of cases which can just as well be decided in state courts.¹⁰⁸ Although the

102. *Id.* at 129-38.

103. *Id.* at 87.

104. Although he approaches the issue from a different perspective, Anderson, a district court judge in Minnesota, would agree that the existence of two court systems, federal and state is inefficient. Since there is an increasing overlap of subject matter—federal courts deal with state and local legislation and state courts handle cases arising under the Constitution and federal law—and a growing uniformity in the procedures followed in both, all the courts should be unified into one system. Anderson, *supra* note 40, at 1203-04.

105. Except for a very brief period in 1801, the federal courts did not have jurisdiction over federal question cases until 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. This provision is currently codified in 28 U.S.C. § 1331 (1970). Prior to this time the vindication of federal claims was confined to state courts, although the United States Supreme Court would review the case on appeal if the state court denied a claim of federal right. Act of September 24, 1789, § 25, 1 Stat. 73, 85. Since 1875 the grant of jurisdiction has grown steadily as a result of both congressional enactments and Supreme Court interpretations of existing statutes. This growth in jurisdiction is catalogued in H. FRIENDLY, *supra* note 15, at 15-54; Friendly, *supra* note 52, at 1020-30; Frankfurter, *supra* note 37, at 507-11.

106. Given the fact that the federal courts cannot control their caseload, if the solution requires the diversion of cases out of the federal courts, it is better to get rid of those based on diversity of citizenship rather than federal question litigation. Accord, Fraser, *supra* note 91, at 191.

107. 28 U.S.C. § 1332 (1970), which governs diversity of citizenship jurisdiction, reads in relevant part as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between— (1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(c) *** [A] corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business ***.

(d) The word 'States,' as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Id.

108. See notes 266-322 and accompanying text *infra*. As Judge Bratton recently noted,

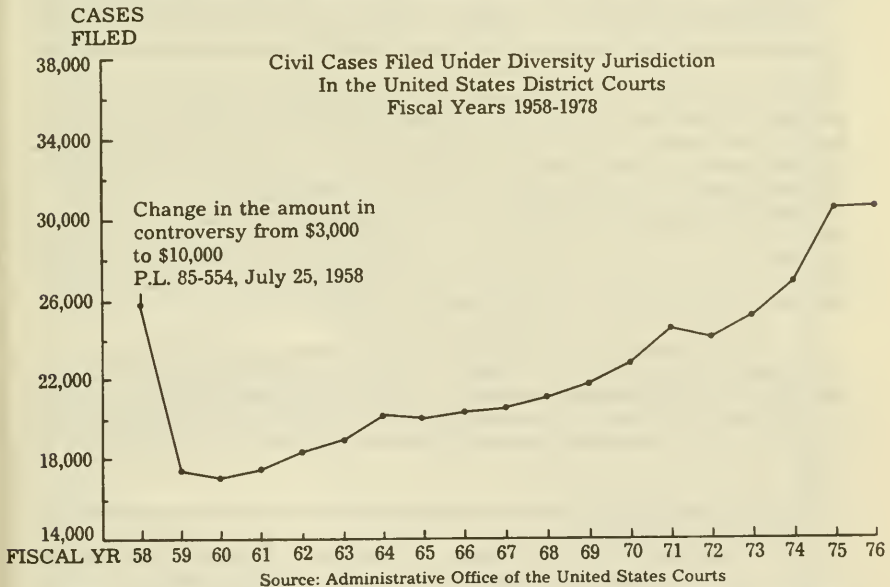
Ultimately there should be a fair and rational allocation of the nation's liti-

proportional increase in diversity cases has not been as great in recent years as the increase in other categories of cases,¹⁰⁹ suits based on diversity of citizenship do account for more than 24% of the total number of civil filings in the federal district courts,¹¹⁰ and more than five out of every eight cases that do not rest on federal question jurisdiction are based on diversity.¹¹¹ At the appeals

gation based upon the principle that, since state courts are the authoritative expositors of state law under our system, they should be the courts where such issues are tried, and upon the principle that federal courts should be limited to their proper role as national courts dealing with litigation affecting federal rights.

Bratton, *supra* note 91, at 354. See also *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941), *rehearing denied*, 314 U.S. 714 (1941) (Frankfurter, J.) ("The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business.").

109. Between 1962 and 1976 the number of civil cases commenced in the federal district courts rose from 61,836 to 130,597 an increase of over 100 percent. UNITED STATES COURTS 1976, *supra* note 1, at 169. During the same period the number of diversity cases filed rose at a slower rate, from about 18,000 to 31,675. *Id.* at 122-23. This rise is graphically depicted as follows:



Id. at 123. The reason for the decline shown is that in 1958 Congress raised the jurisdictional amount from \$3,000 to \$10,000. 28 U.S.C. §§ 1331-1332 (1970). Nevertheless, by 1973 the numbers had risen to the pre-1958 level and they continued to increase at a slow but steady rate since then.

110. UNITED STATES COURTS 1976, *supra* note 1, at 122.

111. See Chart #1 at text following note 20 *supra*.

court level diversity cases represent a smaller percentage of the caseload,¹¹² but they still impose a heavy burden on judicial time and help to exacerbate the already serious caseload crisis.¹¹³

THE CURRENT STATUS OF THE DIVERSITY DEBATE

Ever since the birth of the United States, controversies over what should be the proper distribution of jurisdiction between state and federal courts have centered on the diversity of jurisdiction provision in the United States Constitution.¹¹⁴ Under Article III, the federal judicial power extended to controversies "between a state, or the citizens thereof, and foreign states, citizens or subjects."¹¹⁵ Because this jurisdiction was concurrent with that of state courts, rather than exclusive, however, Congress did not have to invest the inferior federal courts with any of it.¹¹⁶ Nevertheless, fearing local prejudice against foreigners¹¹⁷ or at least local hostility toward incipient capitalist development,¹¹⁸ in the Judiciary Act of 1789 Congress gave the federal courts jurisdiction over suits in which "an alien is a party or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."¹¹⁹

Although, from time to time Congress has raised the jurisdictional amount for both diversity and federal question litigation in

112. For the 1976 fiscal year there were 1,714 diversity appeals out of a total caseload of 10,404 civil appeals. UNITED STATES COURTS 1976, *supra* note 1, at 285-86. Except for the District of Columbia and Ninth Circuits in which these appeals represented only 8 and 12% respectively of the caseload and the Tenth Circuit in which they were about 23%, they ranged between 15 and 20% in all other circuits. *Id.*

Diversity cases place almost no burden on the Supreme Court's caseload, *see* Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339, 350 (1974), especially since petitions for certiorari are almost uniformly denied, Kurland, *supra* note 83, at 630-31, and only a small percentage of diversity cases raise constitutional questions. Casper & Posner, *supra*.

113. *See* notes 2-3 and accompanying text *supra*.

114. *See* Frankfurter, *supra* note 37, at 511-15; Friendly, *supra* note 77; Moore & Weckstein, *supra* note 78, at 1-6; Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A.J. 959 (1960); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). For a history of modern proposals to eliminate diversity, *see* Bratton, *supra* note 91, at 351-52.

115. U.S. CONST. art III, § 1, cl. 1.

116. *See, e.g.*, Mr. Chief Justice Marshall's discussion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

117. *See, e.g.*, Moore & Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society*, 1 FLA. S. U. L. REV. 1, 17 (1973); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9 (1963). *But see* Friendly, *supra* note 77, at 493, who argues that this was never the case. It is also interesting to note that removal was eliminated because it was never used. Moore & Wicker, *supra*, at 17 n.90.

118. *See, e.g.*, Moore & Weckstein, *supra* note 78, at 16-17; Friendly, *supra* note 77, at 498.

119. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

an attempt to ease the burdens of the federal case calendar,¹²⁰ it has never come close to eliminating diversity jurisdiction entirely.¹²¹ The present campaign to eliminate, or at least to restrict the scope of diversity jurisdiction dates from 1959 when Earl Warren, the then Chief Justice of the United States Supreme Court, suggested that the American Law Institute study the allocation of cases between the federal and state court systems in an attempt to determine how to cut down on the federal caseload. In his address to the ALI at its annual meeting he stated: "It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism."¹²²

The proposed legislation that emerged from the ALI study, however, was inadequate to deal with the problem.¹²³ It assumed

120. Originally the federal district courts were given jurisdiction over all actions between citizens of different states where the amount in controversy was greater than \$500. Judiciary Act of 1789 ch. 20, § 11, 1 Stat. 73, 78. It appears that the jurisdictional amount was to prevent defendants from being forced to travel long distances to defend small claims. Moore & Weckstein, *supra* note 78, at 6 n.29. In 1887 the jurisdictional amount was raised to \$2000. Act of March 3, 1887, ch. 373, §- 1, 24 Stat. 552; Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433. In 1911 the jurisdictional amount was raised to \$3,000, Judiciary Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091, and in 1958 to \$10,000, 28 U.S.C. § 1332(a) (1958), where it currently remains.

These developments had some short-term effect on the number of diversity cases. Although the number of cases filed dropped after the last increase of the amount in controversy to \$10,000 in 1958, the number filed is now right back up to where it was before the last congressional action. See note 109 *supra*. The increase in the amount in controversy has had no impact on federal question cases because many deprivations are priceless and the courts have recognized this fact. In fact, the ALI proposal suggested elimination of the amount in controversy in federal question cases, and the new statute presently being considered by Congress has taken the same position.

As an outgrowth of the utilization of the amount in controversy as a way to keep litigants out of the federal courts, a whole body of caselaw on jurisdictional amounts has grown up.

It must also be conceded that manipulation of the amount in controversy is not a good way to deal with the problem of overburdened federal courts because it closes the doors of the federal courthouse to those with smaller claims. If the federal courts are better, which is one of the major rationales for the retention of diversity jurisdiction, see notes 211-227 and accompanying text *infra*, it is unfair to save them for the rich and force the poorer litigants to try their lawsuits in "inferior" tribunals.

121. Examples of some of these bills which were introduced appear in Moore & Weckstein, *supra* note 78, at 14 n.89, and in Moore & Wicker, *supra* note 117, at 16 n.84.

122. ALI PROCEEDINGS 33 (1969), cited in ALI, *supra* note 64, at ix.

123. Although such prominent commentators as Field and Wright originally supported the ALI proposals, Field, *Diversity of Citizenship: A Response to Judge Wright*, 13 WAYNE L. REV. 489 (1967); Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185 (1969), they have both changed their position and now recommend total abolition. H.R. REP. NO. 95-893, 95th Cong. 2d Sess., Appendix (1978); *Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House*

that prejudice against foreigners was still prevalent, and it attempted to pare down the number of diversity cases which could reach the federal courts by rationalizing the system¹²⁴ and increasing the amount in controversy.¹²⁵ Thus, resident plaintiffs would no longer be permitted to sue in federal court because resident defendants were unable to remove cases brought in state court to federal court under the removal statute¹²⁶ and because resident plaintiffs, by definition, would not be subject to prejudice against foreigners. Under the ALI proposal approximately one-half of the diversity cases would be transferred from federal to state courts.¹²⁷

In 1971 Senator Burdick introduced a bill which incorporated the recommendations of the American Law Institute.¹²⁸ Although hearings were held on this legislation during 1971 and 1972,¹²⁹ it never was enacted into law. Thus, Congress did nothing during this period to alleviate the increasingly obvious overburdening of the federal courts.

Mr. Chief Justice Warren Burger took up where his predecessor had left off in urging an overhaul of the federal court system. He went even further, however, and recommended the complete elimination of diversity jurisdiction.¹³⁰ In his annual messages to the American Bar Association he reiterated his call for a redistribution of caseloads which would remove diversity litigation from the federal courts.¹³¹ In response to the growing pressures on the federal caseload a number of bills were introduced in Congress.¹³² After numerous hearings on the various proposals,¹³³ a bill which would entirely eliminate diversity jurisdiction passed the House in

Comm. on the Judiciary, 95th Cong., 1st Sess. 218 (1977) (statement of Charles Alan Wright).

124. See, Burdick, *Diversity Jurisdiction Under the ALI Proposals: Its Purpose & Its Effect on State and Federal Courts*, 48 N.D.L. REV. 1 (1971); Fraser, *supra* note 91.

125. The amount in controversy was to be increased to \$25,000.

126. 28 U.S.C. § 1441 (1970).

127. Burdick, *supra* note 124. Other portions of its proposal, however, would increase the diversity caseload. *Id.*

128. S. REP. NO. 1876, 92d Cong., 1st Sess. (1971). It was reintroduced in 1974 as S. REP. NO. 1876, 93d Cong., 1st Sess. (1974).

129. *Hearings on S. Rep. No. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1 (1971), 2d Sess., pt. 2 (1972).

130. Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125 (1973); Burger, *supra* note 15.

131. *Id.*

132. Thus, S. Rep. No. 2094 would prohibit resident plaintiffs from access to the federal courts while S. Rep. No. 2389 would abolish diversity entirely. In the House of Representatives the comparable bills were H.R. 9123 and H.R. 9622.

133. See *Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

early 1978.¹³⁴ It was sent over to the Senate where it is presently awaiting further action.¹³⁵

Despite the dire need of the federal courts to be relieved of a substantial portion of their caseload,¹³⁶ the clarity of the solution is not apparent to many in the legal profession. Some state court judges have been opposed to the redistribution because they feel that their courts are already overburdened,¹³⁷ and the American Bar Association's House of Delegates, in its last meeting in 1977, after hearing the pros and cons of diversity refused to approve proposed changes. In fact, some commentators even call for the expansion of diversity jurisdiction by requiring only minimal diversity between the parties¹³⁸ rather than maximum diversity, which is currently a precondition to the invocation of federal jurisdiction.¹³⁹

Our analysis of the testimony and the vast literature on this issue suggests that many are unaware of the pros and cons of the continued existence of diversity jurisdiction. Therefore, in the remainder of this article we will analyze the arguments that have been advanced in favor of its retention¹⁴⁰ and those supporting its elimination.¹⁴¹ After becoming familiar with the various positions taken on this issue, it will be easier for the reader to determine in a rational manner¹⁴² whether the elimination of diversity jurisdiction is the most appropriate, politically feasible way of alleviating the burden currently faced by the federal courts.

134. The House Judiciary Subcommittee unanimously recommended to the House Judiciary Committee the more comprehensive bill which was overwhelmingly approved by it on February 7, 1978. H.R. 9622, abolishing diversity, passed the House of Representatives on February 28, 1978 by a vote of 266 to 133, 122 CONG. REC. H1569 (daily ed. Feb. 28, 1978).

135. The Senate companion bill is now being considered by Senator DeConcini's Senate Judiciary Subcommittee.

136. See notes 1-15 and accompanying text *supra*, exposing the problem.

137. See the testimony of the Chief Justice of the Florida Supreme Court to the Burdick Committee, cited in Moore & Wicker, *supra* note 117, at 20 & n.108. The Conference of Chief Justices recently adopted a position favoring the elimination of diversity jurisdiction, however. See text accompanying note 255 *infra*.

138. Moore & Weckstein, *supra* note 78.

139. 28 U.S.C. § 1332 (1970). Thus, removal is possible only if maximum diversity exists.

140. See notes 144-265 and accompanying text *infra*.

141. See notes 266-322 and accompanying text *infra*.

142. All the existing material on the subject of diversity jurisdiction assumes one posture and argues only that position. See, e.g., Moore & Weckstein, *supra* note 78 (pro); Friendly, *supra* note 77 (con). Judge Wright presents both sides, but he gives only cursory treatment to the entire question. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

IF IT WORKS, WHY CHANGE IT: THE TRADITIONALIST APPROACH TO THE REALITIES OF MODERN AMERICAN SOCIETY

The major argument advanced in favor of retaining diversity jurisdiction is that it works.¹⁴³ Diversity jurisdiction was contemplated by the Founding Fathers,¹⁴⁴ it has always been a part of federal jurisdiction,¹⁴⁵ and no one is complaining that it works improperly,¹⁴⁶ so why should it be eliminated. Closely related are the arguments that diversity is convenient,¹⁴⁷ that litigants get better justice in the federal courts,¹⁴⁸ that it is necessary to protect the foreign party from local prejudice,¹⁴⁹ and that the existence of federal practice improves the skills of local attorneys and makes the system more uniform.¹⁵⁰ Others have contended that the state courts do not want the increased caseload,¹⁵¹ and that the real way to deal with the pressure on the federal judiciary is simply to get more judges.¹⁵² In order to test the validity of each of these propositions, we shall first examine the arguments put forth by the traditionalists.

All proponents of the continuation of diversity jurisdiction be-

143. Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C.L. REV. 677 (1965); Frank, *supra* note 117, at 10; Moore & Wicker, *supra* note 117, at 18.

144. Frank, *supra* note 143, at 680-81; Frank, *supra* note 117, at 13; Moore & Weckstein, *supra* note 78, at 15; Wright, *supra* note 142, at 318.

145. Wright, *supra* note 142, at 318, 329; *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. — (1978) (statement of James William Moore) [hereinafter cited as Moore Testimony].

146. Frank, *supra* note 93, at 158; Frank, *supra* note 117, at 8.

147. Moore Testimony, *supra* note 145; Frank, *supra* note 117, at 12.

148. Anderson, *supra* note 39, at 1212-13; Frank, *supra* note 93, at 159-60; Frank, *supra* note 143, at 684; Johnson, *The Role of the Judiciary*, *supra* note 35, at 474-75; Moore & Weckstein, *supra* note 78, at 22; Reath, *Judicial Evaluation—The Counterpart to Merit Selection*, 60 A.B.A.J. 246 (1974); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 330 (1977); Wright, *supra* note 142, at 327-28; *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. — (1978) (statement of Association of Trial Lawyers of America) [hereinafter cited as Association of Trial Lawyers]; Moore Testimony, *supra* note 145.

149. Frank, *supra* note 117, at 9. Even if this is no longer the case, Wright contends that diversity should still be maintained. Wright, *supra* note 142, at 327 ("The fact that the Fathers included diversity in the Constitution primarily because they feared nonresident litigants might suffer prejudice in state courts need not and should not preclude its use a century and three-quarters later for novel reasons only now perceived; if the Constitution confers the authority, we may exercise it in furtherance of any decent social purpose.").

150. Frank, *supra* note 93, at 159; Moore & Wicker, *supra* note 117, at 22; Wright, *supra* note 142, at 327; Association of Trial Lawyers, *supra* note 148, at 5; Moore Testimony, *supra* note 145, at 7-9.

151. Moore & Wicker, *supra* note 117, at 20 n.107.

152. Moore & Weckstein, *supra* note 78, at 26; Moore & Wicker, *supra* note 117, at 25; Wright, *supra* note 142, at 319; Moore Testimony, *supra* note 145, at 2.

gin by noting its constitutional foundations¹⁵³ in article III, section 2 of the United States Constitution.¹⁵⁴ The fact that there is no grant of jurisdiction that is older than diversity convinces its supporters that it is entitled to presumptive validity until its detractors can demonstrate that it does not work properly.¹⁵⁵ Since no one could conceivably argue that diversity jurisdiction does not provide just results for the litigants who come into federal court under its umbrella, they continue, those wishing to eliminate diversity to demonstrate its evils should have the burden of proving its inadequacies.¹⁵⁶

In order to evaluate this argument critically, it is first necessary to remember that the Constitution is permissive with regard to the judicial power of the United States;¹⁵⁷ it permits the Congress to extend judicial power to the limits provided in the Constitution, but it certainly doesn't require that result.¹⁵⁸ Even in the area of diversity jurisdiction Congress and the courts have chosen to constrict federal jurisdiction by requiring complete diversity¹⁵⁹ between the parties rather than simply minimal diversity,¹⁶⁰ by restricting the power of removal,¹⁶¹ and by recognizing two possible

153. See, e.g., Moore & Weckstein, *supra* note 78, at 14-15; Wright, *supra* note 142, at 318.

154. U.S. CONST. art. III, § 2. Article III, sec. 2 provides that "[t]he Judicial Power shall extend . . . to Controversies . . . between Citizens of different States"

155. See, e.g., Moore & Weckstein, *supra* note 78, at 15; Wright, *supra* note 142, at 318; Moore Testimony, *supra* note 145, at 11.

156. "The proper presumption, in our view, is that the inclusion of diversity cases in article III, the vesting of such jurisdiction in the federal courts by the First Congress, the continuation of the jurisdiction, substantially unimpaired, for the life of the Republic, and the frequent invocation of the jurisdiction with a fair record of accomplishing justice between litigants clearly casts the burden of proof on those who seek to abolish or curtail diversity rather than on those who seek to defend or maintain it." Moore & Weckstein, *supra* note 78, at 25. See also Association of Trial Lawyers, *supra* note 148, at 6.

157. Article III provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1, cl. 2.

158. Thus, the Constitution clearly grants Congress the power to decide the extent, if any, of diversity jurisdiction. H.R. REP. NO. 893, 95th Cong., 2d Sess. 2 (1978); *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. — (1978) (Paper of Hunter presented at Williamsburg Conference) [hereinafter cited as Hunter paper].

As Mr. Justice Chase stated in *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10 (1799), "[t]he notion has frequently been entertained, that the federal courts derive their judicial power immediately from the Constitution; but the political truth is, that the disposal of the judicial power (except in a few specific instances) belongs to Congress."

159. 28 U.S.C. § 1332 (1970).

160. The ALI proposal would permit minimal diversity. ALI, *supra* note 64. It is also urged by Moore & Weckstein, *supra* note 78, at 27-30.

161. 28 U.S.C. § 1441 (1970). *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) appeared to hold that complete diversity was constitutionally required. In *State*

bases of a corporation's citizenship.¹⁶² Thus, just because such jurisdiction is *permissible* under the Constitution does not mean that it should be authorized.

Equally important to bear in mind is that the Constitution is not only a statement of basic principles; it is also a historical document which, to a certain extent, reflects the concerns of the time times in which it was drafted. The Constitutional Convention was convened to rescue the new nation from impending disaster, and the Constitution was drafted to solve numerous specific problems that had arisen under the Articles of Confederation. Particularly troublesome was the parochialism of the states and the lack of allegiance to the concept of a central unifying authority.¹⁶³ Thus, proponents of the federal form of government perceived the need to create a national consciousness.¹⁶⁴ The judicial system was one institution which could assist in this process.¹⁶⁵ This need, however, is certainly less relevant today.

Assuming that diversity jurisdiction had an important role to play in the early development of the federal judiciary, however,

Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967), however, the Supreme Court decided that this was merely statutory construction.

162. In 1958 Congress restricted a corporation's use of diversity jurisdiction by deeming a corporation to be the "citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c) (1970). Thus a whole caselaw has developed regarding the definition of principal place of business. See, e.g., *Riggs v. Island Creek Coal Co.*, 542 F.2d 339 (6th Cir. 1976); *Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140 (3d Cir. 1972); *Boggs v. Blue Diamond Coal Co.*, 432 F. Supp. 19 (E.D. Tenn. 1977); *Van Horn v. Western Elec. Co.*, 424 F. Supp. 920 (E.D. Mich. 1977).

163. See Moore & Weckstein, *supra* note 78, at 1-2; P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1 n.1 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

164. Hamilton was a strong proponent of this position.

The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.

THE FEDERALIST NO. 81, at 510 (A. Hamilton) (B. Wright ed. 1961). Mr. Justice Story took a similar position in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816), in explaining the basis for diversity jurisdiction: "The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."

165. See, HART & WECHSLER, *supra* note 163, at 6; ALLI, *supra* note 64, at 101; Shapiro, *supra* note 148, at 327. As Moore stated in his testimony before the Senate, "[The circuit courts] were courts of great dignity and brought home to all sections of the country the judicial existence of the new Republic. In doing this, diversity jurisdiction served the Nation well." Moore Testimony, *supra* note 145, at 7. See also, 122 CONG. REC. H1555-1556 (daily ed. Feb. 28, 1978) (remarks of Rep. Railsback).

does not resolve the problem.¹⁶⁶ Old laws are not automatically sacrosanct,¹⁶⁶ and what made sense in 1789 may be meaningless in 1978 when the United States faces different problems and needs to utilize its courts to protect different values.¹⁶⁷ If the good of the United States does not require the courts to serve a nationalizing function but instead needs them to protect constitutional rights from majoritarian tendencies or to provide uniform administration of statutorily created federal rights and remedies, diversity jurisdiction becomes anachronistic.¹⁶⁸ Another major difference between 1789 and 1978 concerns the size of the federal caseload. The federal courts of the late eighteenth century had little business besides diversity.¹⁶⁹ Today, however, they are much too busy,¹⁷⁰ and some cases must be pared. Thus, whether diversity jurisdiction "works"—in the sense that it metes out justice to the parties who can compel a federal court to hear their claim because of the diversity of their citizenship¹⁷¹—becomes an irrelevant question when the amount of strain on the federal bench is considered.¹⁷²

166. This position is eloquently argued by Hunter at the Williamsburg Conference:

[T]hroughout the history of our nation there have been numerous and repeated changes in the original laws of our nation to meet the changes occurring in our society. The 1789 laws were never intended to be sacrosanct and to meet the needs of a 1978 society. 189 years ago conditions were vastly different. Certain changes of law have had to occur, have often occurred, and need to occur in the future if our nation and its three branches of government are to survive and properly serve this nation. Fortunately, the American people can look to their elected representatives, their Congress, to be sensitive to these problem areas where change is needed and to make those changes of law which are meritorious and in the interest of the people of this nation.

Hunter paper, *supra* note 158, at 11-12. This position is in direct contradiction to that taken by the supporters of diversity that because it is old, it must be good. See notes 144-45 *supra*.

167. See notes 299-300 and accompanying text *infra*.

168. H.R. REP. NO. 893, 95th Cong., 2d Sess. (1978); *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) (statement of Representative Kastenmeier) [hereinafter cited as Kastenmeier statement].

169. Moore & Weckstein, *supra* note 78, at 19.

170. See notes 1-15 and accompanying text *supra*.

171. Frank argues that if diversity works, that is a sufficient reason to retain it; the strain on the federal bench can be remedied in other ways than by eliminating diversity. Frank, *supra* note 143; Frank, *supra* note 117; Frank, *supra* note 93.

172. See text accompanying note 265 *infra*. This position underlies the decision by the House of Representatives to vote to eliminate diversity jurisdiction entirely.

[T]he proposed legislation recognizes that diversity is an idea whose time has passed. The Federal courts are a scarce resource and should be treated as such. The flood of case filings can only be checked by controlling the flow of lawsuits. Just as with the energy crisis, priorities and rules of consumption must be set. First, there should be only one court per customer—the choice of forum is a luxury that our judicial system can no longer afford. Second, the Federal courts must be freed from the shackles of congestion to do the job they do best

Instead, we must ask which type of litigation "deserves" federal protection¹⁷³ and what kinds of cases can be handled competently by the state courts.¹⁷⁴

Furthermore, the argument of the proponents of diversity jurisdiction suffers from the flaw of assuming that there is a fundamental right to choice of forum.¹⁷⁵ Representative of this position is the statement made by the Association of Trial Lawyers of America to the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary: "It is in the very offering of an *alternative*—an *option*—as to dispute resolution—that we believe the Federal government is providing its citizens with a social service of unquestionable legitimacy."¹⁷⁶ Instead, the choice of forum is a luxury that the States can no longer afford.¹⁷⁷ From this perspective, their argument that the opponents of diversity have the burden of demonstrating that there are substantial reasons to limit diversity¹⁷⁸ is not persuasive.

The reasons for including diversity jurisdiction in the original grant of judicial power to the federal judiciary remain unclear.

H.R. REP. NO. 893, 95th Cong., 2d Sess. 4-5 (1978).

This congestion argument, however, is rejected entirely by the proponents of diversity who tend to be myopic and view the question in a vacuum. According to the Association of Trial Lawyers, the blind advocacy of judicial efficiency must be rejected because court congestion symbolizes that the United States has a calm, deliberative and thorough legal system which values protection of human rights, unlike the courts of Uganda in which there is no congestion. Association of Trial Lawyers, *supra* note 148, at 6.

173. See note 35 *supra*.

174. This formulation of the problem essentially pits corporations against poor people. The former groups prefer to litigate in federal court because they utilize the choice of forums to generate delays. Kastenmeier Statement, *supra* note 168, at 11; H.R. REP. NO. 893, 95th Cong., 2d Sess. Exhibit C at 27 (1978) (letter from Kenneth L. Karst to Robert W. Kastenmeier, Dec. 6, 1977); Hunter paper, *supra* note 158; *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) (Hunter testimony) [hereinafter cited as Hunter testimony]. The latter prefer the federal courts because of their role as protectors of federal rights. See Neuborne, *Myth of Parity*, *supra* note 53; *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 255-60 (1977) (statement of Steven Steinglass, Legal Action of Wisconsin, and Dennis Sweeney, Baltimore Legal Aid Bureau).

175. Association of Trial Lawyers, *supra* note 148, at 1-2; Moore Testimony, *supra* note 145. This, however, is not the case. See WRIGHT, MILLER & COOPER, 13 FEDERAL PRACTICE & PROCEDURE § 3601, at 596 (1975); *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) (statement of Daniel Meador) [hereinafter cited as Meador statement]. Since federal courts were always intended to be courts of limited jurisdiction, Congress can determine that litigants should not be allowed to use them unless there is a good reason for it.

176. Association of Trial Lawyers, *supra* note 148, at 1-2.

177. See note 172 *supra*; Hunter testimony, *supra* note 174, at 9.

178. See text accompanying note 156 *supra*.

The recorded debates in the Constitutional Convention provide little guidance in this area.¹⁷⁹ Aside from the nationalizing function discussed above,¹⁸⁰ three possible reasons emerge to explain why diversity jurisdiction was mentioned in the Constitution. The most often cited rationale is that because the drafters of the Constitution feared that state courts would be biased or prejudiced against out-of-state litigants, they included diversity to protect the foreign party from local prejudice.¹⁸¹ Closely related is the argument that the federal courts were superior to their state counterparts and, thus, as many cases as possible should be routed in their direction.¹⁸² Finally, a number of commentators have recently suggested that diversity was created to assist commercial development in the United States, since the drafters feared that some state courts were so biased toward debtors that they would not be able to deal fairly with the legitimate rights of creditors, whether from that state or another.¹⁸³

Although some commentators question whether state courts ever manifested the local prejudice against foreign litigants which the grant of diversity jurisdiction was supposed to remedy,¹⁸⁴ it is possible that the fear, rather than the reality, of local prejudice may have played a part in the decision to create diversity jurisdic-

179. According to a study done by the Congressional Research Service of the Library of Congress, "[t]he records of the Federal Convention are silent with regard to the reasons the Framers included in the judiciary article jurisdiction in the federal courts of controversies between citizens of different States, but since the Judiciary Act of 1789 'diversity jurisdiction' has been bestowed statutorily on the federal courts." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 732 (1972). See also Friendly, *supra* note 77, H.R. REP. NO. 893, 95th Cong. 2d Sess. 2 (1978).

180. See notes 163-165 and accompanying text *supra*.

181. The source for this position is a statement by Mr. Chief Justice Marshall in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809):

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

See also notes 149 and 164 *supra*.

182. The following statement by Alexander Hamilton that "every man may discover that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union," THE FEDERALIST NO. 81, at 486 (A. Hamilton) (Mentor ed. 1961), can also be seen as supporting the position that since the federal courts were better than the state courts, it was preferable to route as many cases into them as possible.

183. Moore & Weckstein, *supra* note 78, at 16-17; Friendly, *supra* note 77, at 502 n.92.

184. See Frankfurter, *supra* note 37, at 520-22; Friendly, *supra* note 77, at 493-97.

tion.¹⁸⁵ Granting this proposition, however, does not compel the conclusion reached by Moore and Weckstein that "[w]hile local prejudices and state jealousies may be diminishing, it is a fair inference that some litigants still resort to the federal courts because of apprehensions as to the kind of justice that they will receive in the courts of the state of which their adversary is a citizen."¹⁸⁶

Instead, it can be persuasively argued that the concept of local prejudice as a basis for the exercise of diversity jurisdiction has been effectively eliminated by changes which have taken place in American society in recent years.¹⁸⁷ Today, Americans travel more freely than they did in the past, and they readily move their residences and businesses from one state to another. At the same time, their friends and relatives are also exhibiting similar geographic mobility. All of this movement has done much to undermine local parochialism.¹⁸⁸ Thus, a litigant's state of residence has no significance in the kind of treatment he or she will receive in a court of law.¹⁸⁹ While pride in one's state still exists under certain circumstances, it would be unlikely to manifest itself through antagonism against citizens of another state.¹⁹⁰

185. See Moore & Weckstein, *supra* note 78, at 14-16.

186. Moore & Weckstein, *supra* note 78, at 16.

187. Although state citizenship is no longer a factor in the ability of litigants to receive justice in state courts, prejudices based on race, sex, religion, economic class, nationality, and age still affect the judicial process in both state and federal courts. See H.R. REP. NO. 893, 95th Cong., 2d Sess. 4 (1978). Moreover, while prejudice against corporations and insurance companies, the largest users of diversity jurisdiction, exists, this prejudice has nothing to do with the corporation's state of residence. FRIENDLY, *supra* note 15, at 148; Meador statement, *supra* note 175, at 9.

188. Even with diversity jurisdiction, however, it would be impossible to eliminate the effect of local bias, if such bias truly existed. See generally Fraser, *supra* note 91, at 194-95. Thus, those cases between citizens of different states whose amount in controversy was below the statutorily defined minimum would have to be tried in state court under all circumstances. 28 U.S.C. § 1332 (1970). Similarly, cases in which diversity was not complete had no access to the federal courts. *Id.* Thus, a case like *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which there was likely to be extreme local bias, could not be tried in federal court because of the lack of complete diversity. Other cases no doubt abound in which similar injustices were suffered at the hands of parochial local attitudes. Because of the fact that local and federal juries are chosen from the same populations, however, similar local sentiments might have prevailed even if cases such as *Sullivan* had been brought in federal court. See H.R. REP. NO. 893, 95th Cong. 2d Sess. Exhibit C (1978) (letter from Kenneth L. Karst to Robert W. Kastenmeier, December 6, 1977).

189. See Hunter testimony, *supra* note 174, at 8; Hunter paper, *supra* note 158. Kastenmeier also contends that technological changes, increased education, and economic prosperity all operate to reduce the risk of local prejudice. H.R. REP. NO. 893, 95th Cong., 2d Sess. 4 (1978). See also *Asher v. Pacific Power & Light Co.*, 349 F. Supp. 671, 674 (N.D. Cal. 1965); *F & L Drug Corp. v. American Central Ins. Co.*, 200 F. Supp. 718, 723 (D. Conn. 1961).

190. This same theme was iterated in the prepared statement of Legal Services Attorneys delivered to the Senate Committee:

The original justification for diversity jurisdiction was the fear that state

These changes were explicitly recognized by the United States Congress when it amended the federal removal statute in 1948. The former removal statute, which traced back to 1867, authorized removal by the defendant "when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice" in a state court.¹⁹¹ This provision was repealed in 1948 on the following grounds:

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.¹⁹²

Although diversity jurisdiction is still widely employed by litigants throughout the United States,¹⁹³ there is as little reason for its continued existence on the basis of the prejudice argument as there was for the removal statute.

The one reported empirical study of the *utilization* of diversity jurisdiction by local attorneys supports the conclusion that perceived local prejudice is not important in their choice of a federal forum.¹⁹⁴ Eighty-two Wisconsin attorneys were asked to indicate all the considerations that had led them to choose a federal rather than a state forum. The author hypothesized that under the tradi-

courts would be prejudiced against citizens of other states who litigated before them. During the early decades of the Republic, the apprehension was undoubtedly valid and it probably made sense for federal judges to spend their time interpreting state law to guard against parochialism. There were then few issues of federal law as well. Today, however, there is little evidence of state judicial prejudice against litigants from other states Basic principles of federalism once supported the concept of diversity jurisdiction. Today, absent widespread interstate bias, that same federalism demands that state courts interpret their own law of contracts, torts, and real property, not courts of the federal government.

Id. at 9.

191. Act of March 2, 1867, 14 Stat. 559.

192. See revisor's notes to 1948 amendment to removal statute.

193. See text accompanying note 314 *infra*.

194. Summers, *Analysis of Factors that Influence Choice of Forum of Diversity Cases*, 47 IOWA L. REV. 933 (1962). One other published study exists on this issue. Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 52 VA. L. REV. 178 (1965). There, however, the author asked attorneys what factors would lead them to prefer a federal or a state court. Summers had asked instead why attorneys actually chose federal court. This difference may explain the divergence of their reported results. It is very likely that the Virginia attorneys responded with the traditional reasons for choice of forum and that accounts for the fact that 60% stated that local prejudice against out-of-state clients motivated them to sue in federal court. For a critique of the Virginia study, see Shapiro, *supra* note 148, at 331 & n.78.

tional wisdom, all the attorneys would list local prejudice as at least one of their reasons.¹⁹⁵ This, however, was very far from the truth, since this factor was listed by only seven attorneys, and it was not the sole factor in any of these cases:¹⁹⁶

<u>Reasons for Choosing Federal Forum</u>	<u>No. of Responses</u>	<u>Percentage of Total Responses</u>
Geographical convenience	30	18.3
Broader discovery procedures in federal courts	26	15.9
Federal juries render higher awards	23	14.0
Greater confidence in the independence and judicial temperament of federal jurist	16	9.8
Calendar of federal court was more current	15	9.1
Federal juries are superior to state juries	11	6.7
Choice of forum was made by client	11	6.7
On referral from an attorney who had selected the federal court	8	4.9
Other	8	4.9
Local bias against nonresident client*	7	4.3
Calendar of federal court was more congested	3	1.8
Bias other than nonresidency	2	1.2
Greater familiarity with federal procedure	2	1.2
Availability of federal interpleader	2	1.2
	<u>164</u>	<u>100.0</u>

*"Justification according to classical theory."

Since the major reasons for choosing the federal courts over the state courts are tactical—geographical convenience, better discovery procedures, and the expectation of receiving a higher award

195. Summers, *supra* note 194, at 936.

196. *Id.* at 937-38.

from a federal jury¹⁹⁷—Summers concludes that there is no ideological basis left for the existence of diversity jurisdiction.¹⁹⁸

A similar conclusion was reached in a study conducted by the General Accounting Office in the Minneapolis-St. Paul area of Minnesota. On the basis of interviews with eighteen attorneys, it was concluded that the possibility of prejudice did not play a significant role in their choice of forum.¹⁹⁹

Under modern conditions, moreover, even if there is local prejudice against out-of-state litigants, bringing suit in federal court would not cure the problem. Because federal juries under the Juror Selection and Service Act of 1968²⁰⁰ are now drawn from the same registration or voter lists as state jurors, any bias against foreigners exhibited by state juries would also be present in federal ones. Similarly, state and federal judges tend to come from the same background; many federal judges previously were state judges²⁰¹ and federal judges generally come from the states in which they sit.²⁰² Thus, the mere elevation to the federal bench would not purge them of their biases against out-of-state litigants, if such prejudice actually existed.

Whether or not there is still prejudice against certain types of litigants and whatever the form that such prejudice takes,²⁰³ such pockets of prejudice do not require the retention of diversity jurisdiction. Instead, the solution should be the improvement of the quality of state courts.²⁰⁴

197. The reason for this last tactical advantage is that federal courts tend to be located in urban areas where the cost of living is higher than in small towns. Thus, urban, federal juries are more likely to award larger verdicts.

198. Summers, *supra* note 194, at 938.

199. Kastenmeier statement, *supra* note 168. Although the Association of Trial Lawyers admitted the importance of the fact that federal courts are located in major cities and that if its members were limited to state courts, they would often find themselves litigating in rural areas or small towns, the Association still claimed that it was the parochial attitudes of these areas that made the federal courts preferable. Association of Trial Lawyers, *supra* note 148, at 4-5. Nevertheless, it must be recognized that lawyers like to introduce their lawsuits where they are themselves located, and most lawyers practice in large cities, the same places where federal courts are located. Summers, *supra* note 194, at 938.

200. The Jury Selection and Service Act, 28 U.S.C. § 1861 (1970). The only difference between state and federal juries is that federal juries are chosen from a wider area within the state.

201. See note 43 *supra*; Hunter testimony, *supra* note 174, at 9.

202. Hall, *supra* note 43; Neuborne, *Myth of Parity*, *supra* note 53, at 1120 & n.50; Shapiro, *supra* note 148, at 330.

203. See note 187 *supra*.

204. See H.R. REP. NO. 893, 95th Cong., 2d Sess. 4 (1978). The utilization of money from the Law Enforcement Assistance Act, 42 U.S.C. §§ 3701-3796c (1970), to upgrade state judiciaries and the establishment of the National Center for State Courts represent steps taken to improve the quality of state courts. See also notes 232-33 and accompanying text *infra*.

If litigants fear the kind of justice they will receive in the courts of the state in which their adversary is a citizen, it is probably not because of local prejudice against persons from outside the state, but rather because of their perceptions regarding the quality of justice dispensed in state courts in general. But, if well founded, this would work to the detriment of state citizens as well as foreigners. If noncitizens are permitted to choose to litigate in the federal courts, either initially²⁰⁵ or through removal,²⁰⁶ there is no real reason not to extend this privilege to persons who happen to be citizens of the state within which the suit is commenced.²⁰⁷ Those who favor the continuation of diversity jurisdiction argue that it is unfair to penalize noncitizens for what is claimed to be the low level of competence of state judges.²⁰⁸ If their claim is valid, however, it would be equally unfair to penalize citizens as well as noncitizens.

Whether state courts are, in fact, inferior to federal ones, and whether that reason was perceived by the drafters of the Constitution to justify the existence of diversity jurisdiction, dicta to that effect are found sprinkled through Supreme Court decisions²⁰⁹ and in congressional debates.²¹⁰

Those persons who wish to retain diversity jurisdiction inevitably stress the continuing superiority of the federal courts,²¹¹ although some admit that the state courts have improved in their

205. 28 U.S.C. § 1332 (1970).

206. 28 U.S.C. § 1441 (1970).

207. Proponents of diversity suggest this. See Moore & Weckstein, *supra* note 78, at 27; Wright, *supra* note 142, at 327-28 (the federal courts are better, and society is served by having as many cases as possible tried there). But see ALI, *supra* note 64, at 103 ("pushing the constitutional grant of diversity jurisdiction to the maximum would be destructive of the dignity and prestige of state courts, harmful to the federal courts, and disruptive of federal-state relationships.")

208. See, e.g., Frank, *supra* note 143, at 684; Wright, *supra* note 142, at 328.

209. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 516 n.22 (1973) (Brennan, J., dissenting); District of Columbia v. Carter, 409 U.S. 418, 428 (1973); Mitchum v. Foster, 407 U.S. 225, 241 n.31 (1972); Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring); Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting); Lankford v. Platte Iron Works Co., 235 U.S. 461, 478 (1915) (Pitney, J., dissenting); Burgess v. Seligman, 107 U.S. 20, 34 (1882); Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

210. During the debate on the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985 (1970), Representative Coburn argued:

The United States courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage . . . We believe we can trust our United States courts, and we propose to do so.

CONG. GLOBE, 42d Cong. 1st Sess. 460 (1871) (remarks of Representative Coburn).

211. See note 148 *supra*.

ability to dispense justice in recent years.²¹² The usual bases of federal court superiority mentioned are the high caliber of the federal judiciary,²¹³ and the mediocrity of state judges²¹⁴ and the procedural superiority of federal practice rules.²¹⁵

The most important difference between the federal and state judiciaries is that federal judges have life tenure²¹⁶ while state judges do not.²¹⁷ This difference could have an impact on judicial

212. See, e.g., Moore & Weckstein, *supra* note 78, at 22.

213. Anderson, *supra* note 39, at 1212-13; Johnson, *Role of the Judiciary*, *supra* note 35; Shapiro, *supra* note 148, at 330; Wright, *supra* note 142.

214. Reath, *supra* note 148; Moore & Weckstein, *supra* note 78, at 22.

215. See, e.g., Shapiro, *supra* note 148, at 328; Moore testimony, *supra* note 145, at 10-11.

216. U.S. CONST. art. III § 1, cl. 2.

217. Three general methods of selecting state trial judges exist—appointment, election, either partisan or non-partisan, and appointment initially followed by a retention election. Only in Massachusetts, Rhode Island, New Hampshire, and New Jersey, where judges are appointed for life, do state judges have the same insularity from majoritarian pressures as the federal judiciary enjoys. The following provides the most up-to-date information on methods of judicial appointment in the various states:

- Alabama Appellate, circuit, district, and probate judges elected on partisan ballots. Judges of municipal courts are appointed by the governing body of the municipality.
- Alaska Supreme court justices, superior, and district court judges appointed by governor from nominations by Judicial Council. Approved or rejected at first general election held more than 3 years after appointment. Reconfirmed every 10, 6 and 4 years, respectively. Magistrates appointed by and serve at pleasure of the presiding judges of each judicial district.
- Arizona Supreme court justices and court of appeals judges appointed by governor from a list of not less than 3 for each vacancy submitted by a 9-member Commission on Appellate Court Appointments. Maricopa and Pima County superior court judges appointed by governor from a list of not less than 3 for each vacancy submitted by a 9-member commission on trial court appointments for each county. Superior court judges of other 12 counties elected on non-partisan ballot (partisan primary); justices of the peace elected on partisan ballot; city and town magistrates selected as provided by charter or ordinance, usually appointed by mayor and council.
- Arkansas All elected on partisan ballot.
- California Supreme court and courts of appeal judges appointed by governor with approval of Commission on Judicial Appointments. Run for election on record. All judges elected on nonpartisan ballot.
- Colorado Judges of all courts except Denver County and municipal, appointed initially by governor from lists submitted by nonpartisan nominating commissions; run on record for retention. Municipal judges appointed by city councils or

behavior, if state judges have their eyes on the ballot box or on the

town boards. Denver County judges appointed by mayor from list submitted by nominating commissions; judges run on record for retention.

Connecticut.....All appointed by legislature from nominations submitted by governor except that probate judges are elected on partisan ballot.

DelawareAll appointed by governor with consent of senate.

Florida.....All trial judges are elected on a nonpartisan ballot. All appellate judges are appointed by governor with recommendations by a Judicial Nominating Commission. The latter are retained by running on their records.

GeorgiaAll elected on partisan ballot except that county and some city court judges are appointed by the governor with consent of the senate.

Hawaii.....Supreme court justices and circuit court judges appointed by the governor with consent of the senate. District judges appointed by chief justice of the state.

IdahoSupreme court and district court judges initially are nominated by the Idaho Judicial Council and appointed by the governor, thereafter, they are elected on nonpartisan ballot. Magistrates appointed by District Magistrate's Commission for initial 2-year term; thereafter, run on record for retention for 4-year term on nonpartisan ballot.

Illinois.....All elected on partisan ballot and run on record for retention. Associate judges are appointed by circuit judges and serve 4-year terms.

IndianaJudges of appellate courts appointed by governor from a list of 3 for each vacancy submitted by a 7-member Judicial Nomination Commission. Governor appoints members of municipal courts and several counties have judicial nominating commissions which submit a list of nominees to the governor for appointment. All other judges are elected.

IowaJudges of supreme, appeals, and district courts appointed initially by governor from lists submitted by nonpartisan nominating commissions. Appointee serves initial 1-year term and then runs on record for retention. District associate judges run on record for retention; if not retained or office becomes vacant, replaced by a full-time judicial magistrate. Full-time judicial magistrates appointed by district judges in the judicial election district from nominees submitted by county judicial magistrate appointing commission. Part-time judicial magistrates appointed by county judicial magistrate appointing commission.

KansasJudges of appellate courts appointed by governor from list submitted by nominating commission. Run on record for retention. Nonpartisan selection method adopted for judges of courts in general jurisdictions in 23 of 29 districts.

legislature when they make judicial decisions.²¹⁸ Whether state

Kentucky	All judges elected on nonpartisan ballot.
Louisiana	All elected on open (bipartisan) ballot.
Maine	All appointed by governor with confirmation of the senate, except that probate judges are elected on partisan ballot.
Maryland	Judges of court of appeals, courts of special appeals, circuit courts, and Supreme Bench of Baltimore City appointed by governor, elected on nonpartisan ballot after at least one year's service. District court judges appointed by governor subject to confirmation by senate.
Massachusetts	All appointed by governor with consent of Executive Council. Judicial Nominating Commission, established by executive order, advises governor on appointment of judges.
Michigan	All elected on nonpartisan ballot, except municipal judges in accordance with local charters by local city councils.
Minnesota	All elected on nonpartisan ballot. Vacancy filled by gubernatorial appointment.
Mississippi	All elected on partisan ballot, except that city police court justices are appointed by governing authority of each municipality.
Missouri	Judges of supreme court, court of appeals, circuit and probate courts in St. Louis City and County, Jackson County, Platte County, Clay County, and St. Louis Court of Criminal Correction appointed initially by governor from nominations submitted by special commissions. Run on record for re-election. All other judges elected on partisan ballot.
Montana	All elected on nonpartisan ballot. Vacancies on supreme or district courts and Worker's Compensation Court filled by governor according to established appointment procedure (from 3 nominees submitted by Judicial Nominations Commission). Vacancies at end of term may be filled by election, except Worker's Compensation Court. Gubernatorial appointment face senate confirmation.
Nebraska	Judges of all courts appointed initially by governor from lists submitted by bipartisan nominating commission. Run on record for retention in office in general election following initial term of three years; subsequent terms are 6 years.
Nevada	All elected on nonpartisan ballot.
New Hampshire	All appointed by governor with confirmation of Executive Council.
New Jersey	All appointed by governor with consent of senate except that judges of municipal courts serving one municipality only are appointed by governing bodies.
New Mexico	All elected on partisan ballot.
New York	All elected on partisan ballot except that governor appoints chief judge and associate judges of court of appeals, with advice and consent of senate, from a list of per-

judges are initially appointed or not, in all states except Massachu-

sons found to be well qualified and recommended by the bipartisan Judicial Nominating Commission, and also appoints judges of court of claims and designates members of appellate division of supreme court. Mayor of New York City appoints judges of the criminal and family courts in the city.

- North Carolina All elected on partisan ballot. By executive order, governor has established 1-year trial system for merit selection of superior court judges.
- North Dakota All elected on nonpartisan ballot.
- Ohio All elected on nonpartisan ballot except court of claims judges who may be appointed by chief justice of supreme court from ranks of supreme court, court of appeals, court of common pleas, or retired judges.
- Oklahoma Supreme court justices and court of criminal appeals judges appointed by governor from lists of 3 submitted by Judicial Nominating Commission. If governor fails to make appointment within 60 days after occurrence of vacancy, appointment is made by chief justice from the same list. Run for election on their records at first general election following completion of 12 months' service for unexpired term. Judges of court of appeals, and district and associate district judges elected on nonpartisan ballot in adversary popular election. Special judges appointed by district judges. Municipal judges appointed by governing body of municipality.
- Oregon All judges except municipal judges are elected on nonpartisan ballot for 6-year terms. Municipal judges are mostly appointed by city councils except 1 Oregon city elects its judge.
- Pennsylvania All originally elected on partisan ballot; thereafter, on nonpartisan retention ballot, except police magistrates, city of Pittsburgh—appointed by mayor of Pittsburgh.
- Rhode Island Supreme court justices elected by legislature. Superior, family, and district court justices and justices of the peace appointed by governor, with consent of senate (except for justices of the peace); probate and municipal judges appointed by city or town councils.
- South Carolina Supreme court and circuit court judges elected by legislature. City judges, magistrates and some county judges and family court judges appointed by governor—the latter on recommendation of the legislative delegation in the area severed by the court. Probate judges and some county judges elected on partisan ballot.
- South Dakota All elected on nonpartisan ballot, except magistrates (law trained and others), who are appointed by the presiding judge of the judicial circuit.
- Tennessee Judges of intermediate appellate courts appointed initially by governor from nominations submitted by special commission. Run on record for re-election. The supreme

setts, Rhode Island, New Hampshire and New Jersey they must

court judges and all other judges elected on partisan ballot, except for some municipal judges who are appointed by the governing body of the city.

- Texas All elected on partisan ballot except municipal judges, most of whom are appointed by municipal governing body.
- Utah Supreme court, district court, and circuit court judges appointed by governor from lists of 3 nominees submitted by nominating commissions. If governor fails to make appointment within 30 days, chief justice appoints. Judges run for retention in office at next succeeding election; they may be opposed by others on nonpartisan judicial ballots. Juvenile court judges are initially appointed by the governor from a list of not less than 2 nominated by the Juvenile Court Commission, and retained in office by gubernatorial appointment. Town justices of the peace are appointed for 4-year terms by town trustees. County justices of the peace are elected for 4 years on nonpartisan ballot.
- Vermont Supreme court justices, superior court judges (presiding judges of town courts), and district judges appointed by governor with consent of senate from list of persons designated as qualified by the Judicial Selection Board. Supreme, superior, and district court judges retained in office by vote of legislature. Assistant judges of county courts and probate judges elected on partisan ballot in the territorial area of their jurisdiction.
- Virginia Supreme court justices and all judges of circuit courts, general district, and juvenile and domestic relations district courts elected by legislature. Committee on district courts, in the case of part-time judges, certifies that a vacancy exists. Thereupon, all part-time judges of general district courts and juvenile and domestic relations courts are appointed by circuit court judges.
- Washington All elected on nonpartisan ballot except that municipal judges in second-, third-, and fourth-class cities are appointed by mayor.
- West Virginia Judges of all courts of record and magistrate courts elected on partisan ballot.
- Wisconsin All elected on nonpartisan ballot.
- Wyoming Supreme court justices and district court judges appointed by governor from a list of 3 submitted by nominating committee and stand for retention at next election after 1 year in office. Justices of the peace elected on nonpartisan ballot. Municipal judges appointed by mayor.
- Dist. of Col. Nominated by the president of the United States from a list of persons recommended by the District of Columbia Judicial Nomination Commission; appointed upon the advice and consent of the U.S. Senate.
- American Samoa Chief justices and associate justice(s) appointed by the U.S. Secretary of Interior pursuant to presidential delegation of authority. Associate judges appointed by governor of American Samoa on recommendation of the chief jus-

run for election periodically. This fact could instill a certain amount of caution and a fear of stepping too far afield from local mores.²¹⁹ Similarly, state judges tend to be more reticent than their federal counterparts to declare an act of a state legislature unconstitutional.

Although these generalizations suggest a greater impartiality on the part of the federal judiciary, they have little bearing on the decisionmaking process in diversity cases²²⁰ because the vast number of such cases involve simple tort and contract issues²²¹ in which judges need fear neither inflaming local passions against them nor alienating the legislature. Rather, the considerations outlined above have a much greater bearing on the outcomes of cases challenging the constitutionality of state statutes or those seeking judicial protection of certain constitutional or federal stat-

tice, and subsequently confirmed by the senate of American Samoa.

Guam†.....All appointed by governor with consent of legislature from list of 3 nominees submitted by Judicial Council for term of 5 years; thereafter run on record for retention every 5 years.

Puerto RicoAll appointed by governor with consent of senate.

†Reflects 1976 survey.

THE COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS (Rev. ed. 1978).

218. According to Reath, the state trial judiciary has too many mediocre or second-rate judges who "have denigrated the dignity of their offices by serving as the handmaidens to partisan political leaders on whom the judiciary all too frequently are dependent for their selection, election, compensation, tenure, advancement, and appropriations for general court administration." Reath, *supra* note 148, at 1246. See also Moore & Weckstein, *supra* note 78, at 22.

219. Johnson believes that the basic strength of the federal judiciary is its independence from political and social pressures, and its ability to "rise above the influence of popular clamor." Johnson, *Role of the Judiciary*, *supra* note 35, at 474-75. See also Neuborne, *Myth of Parity*, *supra* note 53.

Neuborne argues both that plaintiffs advancing federal constitutional claims against local officials are more likely to prevail in federal than in state court and that federal district courts are "institutionally preferable" to state appellate courts as forums in which to litigate federal constitutional claims. See also Note, *Stone v. Powell and the New Federalism*, *supra* note 53, at 163-64.

220. [The claim of federal superiority] is unsupportable as applied to state law problems where state law controls. Such a belief, if carried to its logical conclusion, would result in the placing of all litigation in the federal court system Our state courts have exclusive jurisdiction over murder cases with the death penalty applicable; they have jurisdiction over . . . our property rights, our marital rights, inheritance rights, etc. . . . To say they are not to be trusted with the trial of an automobile collision event because of the happenchance of diversity of citizenship is shocking and illogical.

Hunter paper, *supra* note 158, at 6-7.

221. See Chart #1 at text preceding note 21 *supra*.

utory rights.²²² These cases may need the protection of the insulated federal judiciary. Yet, the existence of diversity jurisdiction makes it harder for them to get the consideration they deserve in federal court because the seriously overworked judiciary is spending too much of its judicial time on diversity cases.²²³

Closely linked to the concept that the independence of the federal judiciary which flows from life tenure makes it superior is the belief that the lure of life tenure attracts competent judges to the federal bench.²²⁴ The prestige of the national government itself is also thought to play a role in attracting competent professionals to its service.²²⁵ Finally, the small size of the federal judiciary, as compared with that of the states,²²⁶ could ensure that the highest standards be maintained in the judicial selection process.²²⁷

While it is true in one sense, that the federal government has more prestige than any single state²²⁸ and that most judges would consider elevation from the state to the federal bench to be a promotion, it is somewhat of an overgeneralization to lump all the states together when speaking of judicial selection.²²⁹ There are a number of different methods currently in use for filling the ranks of the state judiciaries, some of which are better than others.²³⁰ Moreover, to the extent that merit selection of judges represents an improvement over selection based on political considera-

222. See notes 218-219 *supra*.

223. See notes 106-113 and accompanying text *supra*.

224. According to Anderson, life tenure, the salary level of the federal judiciary, the freedom from having to run in competitive elections, the retirement of federal judges with no loss of income, and the method of selection all make the federal judicial office more attractive than its state counterpart. Anderson, *supra* note 39, at 1212-13. See also Neuborne, *Myth of Parity*, *supra* note 53.

225. Anderson, *supra* note 39, at 1212.

226. Compare note 92 *supra* with text accompanying note 314 *infra*.

227. Anderson, *supra* note 39, at 1212. This same argument is used by Frankfurter and Friendly to support the elimination of diversity jurisdiction. They believe that if the increase in caseload continues, Congress will be forced to increase drastically the size of the federal judiciary which will have the ultimate effect of diluting the high quality of the federal bench by forcing the government to fill the new positions with mediocre people. See H. FRIENDLY, *supra* note 15, at 28-31; Frankfurter, *supra* note 37, at 515.

228. Anderson, *supra* note 39, at 1212.

229. See note 217 *supra* for a discussion of the various forms of judicial selection.

230. The various forms of judicial selection presently being used are described in note 217 *supra*. Below is a graphic representation of the forms of judicial selection:

tions,²³¹ some of the states are ahead of the federal government.²³² Finally, in so far as the states have developed mechanisms for disciplining and removing judges who are incompetent,²³³ they are

Partisan election	Election by Legislature	Appointment	Missouri Plan	Nonpartisan election
Alabama	Connecticut	Alabama	Alaska	Arizona
Arkansas	Rhode Island	Delaware	California	California
Florida	South Carolina	Hawaii	Colorado	Idaho
Georgia	Vermont	Maine	Illinois	Michigan
Indiana	Virginia	Maryland	Indiana	Minnesota
Kansas		Massachusetts	Iowa	Montana
Kentucky		New Hampshire	Kansas	Nevada
Louisiana		New Jersey	Missouri	North Dakota
Mississippi			Montana	Ohio
Missouri			Nebraska	Oregon
New Mexico			Oklahoma	South Dakota

Uppal, *Approaches to the Selection of Judges*, 47 ST. GOV'T 46, 47 (1974), reprinted in Note, *Methods of Judicial Selection and a Viable Alternative*, 4 SAN FERNANDO V. L. REV. 109 (1975). For a discussion of alternative forms of judicial selection, see SELECTED READINGS ON JUDICIAL SELECTION AND TENURE (G. Winters ed. 1974); Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731; Kaminsky, *Judicial Selection: Alternatives to the Status Quo in the Selection of State Court Judges*, 48 ST. JOHN L. REV. 496 (1974); Note, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267 (1976); Note, *Methods of Judicial Selection and a Viable Alternative*, *supra*.

231. According to Hyde, a good selection system should logically:

1. systematically seek the best potential judicial talent;
2. discriminate between aspirants on the basis of their qualifications;
3. operate in a dignified manner so as not to alienate potential candidates;
4. provide sufficient tenure to encourage quality decisions and to permit competent attorneys to give up flourishing law practices to seek judicial office;
5. deserve public respect and trust.

Hyde, *Good Judges are Made*, JUSTICE IN THE STATES 168 (National Conference on the Judiciary 1971). Hyde and most other commentators agree that merit selection of judges comes closest to achieving these salutary results. *Id.*; Atkins, *Merit Selection of State Judges*, 50 FLA. B.J. 203 (1976); Seiler, *Judicial Selection in New Jersey*, 5 SETON HALL L. REV. 721 (1974); Note, *Judicial Selection and Tenure—The Merit Plan in Ohio*, 42 U. CIN. L. REV. 255 (1973); *Judicial Selection in New York: A Need for Change*, 3 FORDHAM URBAN L.J. 605 (1975); Note, *Judicial Selection in the States*, *supra* note 230; Note, *Methods of Judicial Selection and a Viable Alternative*, *supra* note 230. According to Atkins, *supra* at 202, however, there is no real difference in the kinds of judges that are chosen under the various systems. *But see* Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104 (1964).

232. Merit selection has still not been instituted for district court judges. President Carter and Attorney General Bell have expressed their desire to fill district court vacancies in this manner, but, so far, Congress appears unwilling to give up its control over the patronage involved in filling district court positions. For a discussion of the use of merit selection to fill vacancies at the federal appeals court level, see note 44 *supra*.

233. Forty-six jurisdictions, the District of Columbia, Puerto Rico and Guam have formal mechanisms for disciplining their judges. The vast majority have commission plans; Delaware, New York and Oklahoma utilize courts on the judiciary; and New Jersey, Vermont, and Puerto Rico use their Supreme Courts in some capacity. ABA, STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIRE-

more advanced than the federal judiciary with regard to whom it is still an open question whether judicial removal by means other than impeachment²³⁴ is possible.²³⁵

Commentators who favor the retention of diversity jurisdiction also argue that federal judicial procedures are superior to those available in the states. Moore and Wicker cite, as examples, non-technical pleadings, third party practice; broad discovery, a better attitude toward harmless error, effective pretrial procedures, a superior jury system, greater authority of the judge over the conduct of the trial, simpler appellate procedures, and better court administration.²³⁶ Other procedural niceties include the 100-mile bulge rule²³⁷ and the federal interpleader statute.²³⁸

Such procedural superiority, however, does not necessarily support the continuation of diversity jurisdiction in its present form.²³⁹ Because there is an amount in controversy precondition for diversity cases, these procedures are unavailable to those with less expensive cases, although they would appear to be as valuable to these litigants. In addition, even the strong proponents of this position recognize that most of the states have followed the lead of

MENT 6 (Tentative Draft, December, 1977); AMERICAN JUDICATURE SOCIETY, JUDICIAL DISABILITY AND REMOVAL COMMISSIONS, COURTS AND PROCEDURES (1973); Greenberg, *The Task of Judging the Judges*, 59 JUD. 459, 459-60 (1976).

Most of these procedures are relatively new, so there are, as yet, no critiques of their effectiveness. California's system, however, has been in operation since 1960. It is evaluated in Note, *Judicial Discipline in California: A Critical Re-evaluation*, 10 LOY. L.A.L. REV. 193 (1976).

234. Presently, a federal judge serves for life unless he is impeached by Congress "for conviction of treason, bribery, other high crimes and misdemeanors." U.S. CONST. art. II, § 4.

235. In *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74 (1970), the United States Supreme Court let stand the disciplining of a federal district court judge by the Judicial Council. There is, however, great controversy presently raging over this issue. See Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711 (1975) (federal district court judge opposed to all attempts to remove or discipline federal judges except via impeachment); Boyd, *Federal Judges: To Whom Must They Answer*, 61 A.B.A.J. 324 (1975) (supports judicial removal bill for the federal judiciary).

236. Moore & Wicker, *supra* note 117, at 19. See also Shapiro, *supra* note 148, at 328 (consolidation of multidistrict litigation in a single district for pre-trial purposes, 28 U.S.C. § 1407, transfer of case to more convenient forum, 28 U.S.C. § 1404(a), availability of pretrial discovery in other districts, FED. R. CIV. P. 45(d), ability to register federal court judgment in any other federal court, 28 U.S.C. § 1963); Moore testimony, *supra* note 145, at 10 (greater resources of federal court, greater mobility of federal judiciary, ability to handle multi-district litigation, nationwide process, convenience of federal forum).

237. FED. R. CIV. P. 4(f) enables federal courts to get jurisdiction over some out-of-state parties, and FED. R. CIV. P. 45(e)(1) extends the 100-mile bulge rule to the service of subpoenas on witnesses.

238. 28 U.S.C. § 2361 (1970) authorizes nationwide service in interpleader cases. It should be noted, however, that state long-arm statutes can accomplish similar results in state courts.

239. See note 207 *supra*.

the federal government in making the procedural reforms discussed above.²⁴⁰ And since the federal courts must still resolve the case by applying the same law as the state court would,²⁴¹ the quality of the justice dispensed in diversity cases should vary little between the state and federal courts.

Aside from the alleged bias against foreigners²⁴² and the superiority of the federal judicial system,²⁴³ the proponents of diversity jurisdiction laud its role in improving the administration of justice in both state and federal courts.²⁴⁴ They contend that the existence of diversity not only forces local attorneys to practice regularly in federal court,²⁴⁵ but it also allows new and innovative ideas to move from one court system to the other.²⁴⁶ Without diversity, it is argued, a specialized federal bar will develop which will retard both of these useful developments.²⁴⁷

What these commentators fail to realize, however, is that the entire movement to eliminate diversity is based on the existence of too many other types of cases in federal court.²⁴⁸ Because of the great increase in federal litigation, largely through the expansion of federal question jurisdiction,²⁴⁹ it is highly unlikely that a specialized bar will ever develop.²⁵⁰ Instead, such expansion probably brings more attorneys into federal court than diversity jurisdiction ever did. In fact, those persons who stand most to lose by the elimination of diversity jurisdiction are attorneys who currently appear only in federal court; without diversity, they will have to become willing to litigate in state courts or risk losing clients.²⁵¹

240. Thus, over forty states, including Minnesota, have adopted rules of procedure which are almost identical to the Federal Rules of Civil Procedure. See Meador statement, *supra* note 175. Moreover, many of the procedural advantages discussed in note 236 and accompanying text *supra* are also available in state courts through reciprocal or uniform laws. See Shapiro, *supra* note 148, at 328.

241. This has been true ever since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). A federal court's interpretation of state law is just less authoritative. Hertz, *Misreading the Erie Signs: The Downfall of Diversity*, 61 KY. L. REV. 861 (1973). See notes 283-294 and accompanying text *infra*.

242. See notes 181-204 and accompanying text *supra*.

243. See notes 205-241 and accompanying text *supra*.

244. See note 150 *supra*.

245. See, e.g., Frank, *supra* note 143, at 683; Wright, *supra* note 142, at 327; Association of Trial Lawyers, *supra* note 148, at 5.

246. See, e.g., Frank, *supra* note 117, at 11; Frank, *supra* note 93, at 159-60; Shapiro, *supra* note 148, at 325; Wright, *supra* note 142, at 326; Association of Trial Lawyers, *supra* note 148, at 5.

247. Frank, *supra* note 143, at 683; Association of Trial Lawyers, *supra* note 148, at 5.

248. See notes 1-2 and accompanying text *supra*.

249. See note 20 and accompanying text *supra*.

250. Shapiro, *supra* note 148, at 324; Meador statement, *supra* note 175, at 6.

251. Meador statement, *supra* note 175, at 6.

Finally, it is argued that the elimination of diversity jurisdiction will not resolve the problems facing the federal judiciary. Rather than overburdening the states with cases that they do not want,²⁵² the real solution is simply to increase the size of the federal judiciary.²⁵³

Support for the argument that the states do not want diversity cases comes primarily from statements made by members of the Florida and North Dakota Supreme Courts in 1971.²⁵⁴ Since then, however, the Conference of Chief Justices, which represents the Chief Justices of all the state supreme courts, has gone on record as strongly supporting the elimination of diversity jurisdiction.²⁵⁵

252. See note 151 *supra*.

253. See note 152 *supra*.

254. *Hearings on S.1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 267-68 (1971) (letter from Chief Justice Alvin C. Strutz, North Dakota Supreme Court, to Senator Quentin Burdick, Sept. 20, 1971; letter from Chief Justice B. K. Roberts, Florida Supreme Court, to Senator Edward Gurney, Sept. 22, 1971). See also remarks of Chief Justice Richard W. Ervin, Supreme Court of Florida, to the Fifth Circuit Judicial Conference, quoted in Dyer, *State Trial Courts from a Federal Viewpoint*, 54 JUD. 372, 376 (1971), and reprinted in Moore & Wicker, *supra* note 117, at 20-21.

255. It took this position at its annual meeting in Minneapolis, Minnesota, on August 3, 1977. This resolution reads as follows:

Be it Resolved, that the Conference of Chief Justices approve the recommendations of the Committee of Federal-State Relations concerning the following principles:

(1) Every citizen should have access to our court system as the ultimate forum for the resolution of unavoidable disputes and the protector of his constitutional rights.

(2) The demand for access to our court systems in this country can be expected to increase significantly in the years ahead—a demand which will be implemented by plans for prepaid legal insurance and other methods of making legal services more generally available.

(3) Efforts to divert, where appropriate, the processes of dispute resolution from the federal and state court systems through devices such as arbitration are to be encouraged and accelerated, but such diversion is only a partial answer to the problem.

(4) Notwithstanding reasonable expectations of dispute diversion, it can be anticipated that our federal court system will continue to be overburdened unless increased recognition is given to the role of state courts.

(5) Our state court systems are able and willing to provide needed relief to the federal court system in such areas as:

(A) Adequate review of state court criminal proceedings to assure that federally defined constitutional rights have been fully protected;

(B) Increased participation in the resolution of federal-question cases;

(C) The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts.

(6) National funding to the states should include procedures and allocations to assure that the state court systems receive an equitable share of the funds without prejudice to the independence of the judiciary.

(7) Increased communication between congressional committees considering legislation affecting state courts and such entities as the Conference of Chief Justices will be useful.

In fact, even those, such as Professor Charles Alan Wright, who previously supported its retention, have changed their position.²⁵⁶ The only groups who still argue strongly for diversity jurisdiction are the Association of Trial Lawyers of America,²⁵⁷ whose members specialize in personal injury litigation, and corporate lawyers whose clients prefer the federal courts.²⁵⁸

Furthermore, while one solution to the caseload crisis facing the federal courts might be to increase the size of the federal judiciary whenever necessary,²⁵⁹ it is very unlikely that Congress will do so.²⁶⁰ Thus, to suggest this as the ultimate and logical resolution of the problem is visionary.

The above discussion highlights what is perhaps the major reason for the continuation of diversity jurisdiction—namely, the preference that corporations and their attorneys have for litigating in the federal courts.²⁶¹ In fact, Moore and Weckstein argue that diversity jurisdiction was included in the initial grant of power to the federal courts precisely to encourage commercial and corporate development.²⁶² Not only was it feared that the state courts

256. See *Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 3-4 (1977) (statement of Charles Alan Wright). See also note 123 *supra*.

257. Association of Trial Lawyers, *supra* note 148.

258. John Frank and Professor Moore certainly fall into this category.

259. This argument has been rejected as unwise by a number of commentators on the theory that it would decrease the prestige of the federal bench and lower the quality of the judges chosen because of the need to choose larger numbers. See notes 37-41 *supra* and accompanying text. See also note 227 *supra*. This argument is overstated, however, because there are numerous competent attorneys to fill the positions. What makes this solution unreasonable is that Congress would never authorize the number of judgeships needed to deal adequately with the overcrowded dockets because of the expense of doing so and the patronage problems that a vast increase would inevitably create. See text accompanying notes 43-45 *supra*.

260. See notes 36-45 and accompanying text *supra*.

261. In his testimony before the House Subcommittee, Frank makes a plea to retain diversity for the good of the middle class. *Diversity of Citizenship Jurisdiction/Magistrate Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 240, 245 (1977). Members of this group are typically the plaintiffs in personal injury suits against insurance companies. They like diversity not necessarily because it permits them to get into federal court but because it ensures them of urban juries which are more likely to approve higher recoveries. See note 197 *supra*. If the state venue laws permitted these suits to be brought always in urban areas, this group would not really need diversity jurisdiction. Thus, the real beneficiaries are the corporations which have always preferred to litigate in the federal courts, and it is their attorneys who argue most strenuously for the retention of diversity jurisdiction.

262. See Moore & Weckstein, *supra* note 78, at 17 & n.105. See also Frank, *supra* note 143, at 681-82; Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433, 437 (1932) ("[N]othing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and sanctity of private contracts.").

would prove sympathetic to debtors and hostile their out-of-state creditors,²⁶³ but it was hoped that uniformity in legal treatment from state to state, which would only be possible in the federal courts, would provide a supportive environment within which commercial and corporate enterprises could flourish.²⁶⁴

Thus, the argument that diversity "works" turns out to be little more than that some corporations and some personal injury litigants prefer the federal to the state courts.²⁶⁵ As long as suits

263. See, e.g., Friendly, *supra* note 77, at 495-99; Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1448 (1964).

264. Moore & Weckstein, *supra* note 263, at 1449.

265. One reason for this preference may be that the procedures are the same from one federal district to another while, even with state emulation of the Federal Rules of Civil Procedure, they vary somewhat from state to state. Thus, if an attorney can limit his practice to the federal courts, he does not have to be familiar with different systems.

Evidence that diversity is used primarily by corporations is provided in the following table compiled by Senator Burdick, the Senate's sponsor of the ALI proposals:

TABLE 1
RESIDENCES OF PARTIES IN DIVERSITY OF CITIZENSHIP CASES
COMMENCED IN THE UNITED STATES DISTRICT COURTS,
FISCAL YEAR 1970

Class		Original	Re- moved	Total
Plaintiff	Defendant			
1. Resident	Non res. corp. doing business in state	5,901a	1,775a	7,676
2. Resident	Non res. corp. not doing business in state	1,046a	283	1,329
3. Resident	Other non resident	2,832a	831	3,633
4. Non res. corp. doing business in state	Resident	1,867a	78b	1,945
5. Non res. corp. not doing business in state	Resident	724	18b	742
6. Other non resident	Resident	5,026	95b	5,121
7. Non res. corp. doing business in state	Non res. corp. doing business in state	265a	54a	319
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	71a	14	85

based on diversity of citizenship jurisdiction operate to clog the courts and to the detriment of federal question litigation, the fact that it is preferred by certain litigants is not a sufficient reason to retain it. Similarly, just because diversity jurisdiction is old does not mean that it must be good, especially if the original reasons for diversity jurisdiction are no longer valid. Today, there is no need to forge a national consciousness; prejudice against foreigners, if it ever existed, is no longer potent; the state judiciaries have been upgraded; and new groups claim to need the protection of the federal courts more than corporations do. Furthermore, while the federal courts had little business other than diversity litigation in the early days of this nation's history, they are today extremely overworked, partly because ordinary citizens look directly to the

9. Non res. corp. doing business in state	Other non resident	99a	12	111
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	88	10a	98
11. Other non resident	Non res. corp. doing business in state	883	70a	953
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	31	2	33
13. Non res. corp. not doing business in state	Other non resident	31	4	35
14. Other non resident	Non res. corp. not doing business in state	96	14	110
15. Other non resident	Other non resident	427	56	433
16. Resident	Resident	119a	24	143
17. Unknown		4	4	8
Total Cases		19,510	3,344	22,854

a—shifted by S.1876 to state courts. These cases total 14,109. See Table 2 for further analysis.

b—these cases are not counted as shifted because it is assumed there is a non resident defendant properly joined.

Source: Administrative Office of the United States Courts.

Burdick, *supra* note 124, at 8-9.

According to Meador, one or both parties is a corporation in over 75% of all diversity cases, and, in the remainder, which consist almost entirely of personal injury actions between private individuals, the real defendant is the insurer, a corporation. Meador statement, *supra* note 175, at 8-9.

federal government rather than to their states for the vindication of important statutory and constitutional rights. Finally, the rise of the Commission on Uniform Laws and the prevalence with which state legislatures adopt these uniform statutes would appear better to assure uniformity of treatment of litigants than utilization of diversity jurisdiction. For all these reasons, those who want to retain diversity of citizenship jurisdiction, rather than those who want to eliminate it, should have the burden of demonstrating both why exceeding a threshold amount in controversy makes a case so unique that it must be brought in federal court and how litigating in state courts would unduly prejudice the administration of justice.

CAN THE STATE COURTS HANDLE THE ADDED CASES: CONVINCING THE CYNICS

Having established that the retention of diversity of citizenship jurisdiction serves no compelling federal purpose, it is still necessary to examine critically whether the reasons put forward to support its elimination suggest that such congressional action is logical and rational. These reasons fall into three related categories—that the retention of diversity is not logical because it is not a consistent remedy which is available to all who would be interested in using it;²⁶⁶ that it is more efficient for state courts, which are better at making state law than federal courts, to do so;²⁶⁷ that principles of federalism require that state courts, which are more competent at interpreting state law and less overworked than their federal counterparts, perform their proper share of judicial business.²⁶⁸

The theory that diversity jurisdiction is a "luxurious and basically illogical mechanism"²⁶⁹ has been around for a long time.²⁷⁰ It

266. Burger, *supra* note 130; Fraser, *supra* note 91, at 194-95; H.R. REP. NO. 893, 95th Cong., 2d Sess. (1978); Meador statement, *supra* note 175.

267. Friendly, *supra* note 91, at 634; Hertz, *supra* note 241; Wright, *supra* note 142, at 323; Meador statement, *supra* note 175; Hunter testimony, *supra* note 174, at 6-7.

268. Bratton, *supra* note 91, at 354; Meador statement, *supra* note 175.

269. H.R. REP. NO. 893, 95th Cong. 2d Sess. 2 (1978). As Professor Charles Alan Wright argued in his Statement to the Subcommittee on Courts, Civil Liberties and the Administration of Justice on September 29, 1977, "[w]e cannot afford to maintain an elaborate and basically illogical mechanism that brings nearly 32,000 cases a year into federal courts merely because in a very few of those cases this provides a welcome escape from some disgraceful condition in a particular state court." *Hearings on H.R. 9123 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 220 (1977) (statement of Charles Alan Wright).

270. See generally note 105 *supra*.

prompted Mr. Chief Justice Warren to call for the ALI study,²⁷¹ and it has been adopted by the present Chief Justice as a cornerstone of his plans to revise the caseload of the federal courts.²⁷² "Diversity jurisdiction had some validity for the first hundred years of our history but has had none for at least a generation. Today there is no rational basis to put an automobile accident case in a federal court simply because the litigants reside in different states."²⁷³

Because of the amount in controversy requirement²⁷⁴ and the preconditions which must be met before cases brought initially in state court can be removed to federal court,²⁷⁵ the continued existence of diversity jurisdiction makes little sense even if there were, in fact, local prejudice against out-of-state litigants.²⁷⁶ As things presently stand, if an out-of-state plaintiff sues a local defendant in state court, the case cannot be removed to federal court,²⁷⁷ although an in-state plaintiff has the choice of bringing the case originally in either state or federal court.²⁷⁸ The requirement of complete diversity before federal jurisdiction can be invoked is similarly inconsistent.²⁷⁹ If there truly were prejudice against out-of-state litigants, minimal diversity should be sufficient to get the case into federal court.²⁸⁰ Finally, because of the amount in controversy requirement, not all suits involving citizens of different states can be tried in federal court, despite the operation of the same sort of prejudice against the foreign litigant. If federal courts are really superior to their state counterparts, the amount in controversy requirement suggests that our society wants to preserve this superior form of justice only for cases involving more expensive claims. Apart from the needless litigation which the amount in controversy and other diversity requirements have created,²⁸¹ there is no logical reason why a personal injury suit, for

271. See note 113 and accompanying text *supra*.

272. Burger, *supra* note 130.

273. *Id.* at 1126.

274. 28 U.S.C. § 1332 (1970).

275. 28 U.S.C. § 1441 (1970).

276. See note 188 *supra*.

277. 28 U.S.C. § 1441(b) (1970).

278. 28 U.S.C. §§ 1332, 1441 (1970).

279. 28 U.S.C. § 1332 (1970).

280. In fact, this is exactly what Moore and Weckstein propose. See Moore & Weckstein, *supra* note 78, at 27. See note 207 and accompanying text *supra*.

281. An analysis of the statistics available clearly demonstrates that, on the average, diversity cases are more time consuming than other civil cases. In 1976, for example, of all the civil cases, other than those concerning land condemnation, 8.1% actually resulted in a trial. Of diversity cases, however, 12.9% went to trial. Looking at the statistics from another angle, 3.3% of all civil cases were tried by a jury in 1976; 8.1% of diversity cases were disposed of this way. UNITED STATES COURTS 1976, *supra* note 1, Table C-4, at 312-13.

These findings are consistent with those of a 1969-70 study by the Federal Judicial Center. In that year diversity cases represented 26.2% of all civil findings, but

example, in which damages of \$11,000 are provable should be treated differently from one in which the plaintiff suffers only \$9,000 worth of damages. Because of these logical inconsistencies, diversity jurisdiction is both over- and under-inclusive as a remedy for alleged victims of prejudice. To resolve these problems without further overburdening of the federal courts requires its complete elimination.

A more serious shortcoming of the retention of diversity jurisdiction however, is that it is an inefficient use of federal court time.²⁸² With the landmark decision of *Erie Railroad v. Tompkins*,²⁸³ in which the Supreme Court held that federal courts sitting in diversity cases are to apply the law of the state in which they sit, federal courts were stripped of their ability to contribute meaningfully to the development of the common law.²⁸⁴ Instead, they were expected to discern state law and apply it as the state's supreme court would under the same circumstances.

While this task might appear simple, in practice, it has done more to confuse the law than to create evenhanded application.²⁸⁵ Because the federal court is expected to apply, rather than to create state law, there has been a tendency to construe state law overly mechanistically²⁸⁶ to avoid the charges frequently leveled against federal interpretations by state supreme courts.²⁸⁷ Thus, for example, federal courts, attempting not to step on the toes of the state courts, have had a greater tendency to defer to old state

they took 37.9% of the time of district court judges. FEDERAL JUDICIAL CENTER, THE 1969-1970 FEDERAL DISTRICT COURT TIME STUDY, Table XVII (1971). Federal judges also perceive spending more time on diversity than on other cases. In a study conducted by Shapiro, district court judges thought they spent 32.4% of their time spent on all civil cases on diversity cases, and appeals court judges thought they spent 18.8% of their time on diversity appeals. Yet only 24.3% of civil cases filed in the district courts and 16.5% of the appeals were diversity cases. Shapiro, *supra* note 148, at 334-35.

282. "[T]he arguments for retaining [diversity jurisdiction] will not hold water when the federal courts are overburdened with distinctively federal business. While the *Erie* decision eliminated the evil of forum shopping, it also stripped the federal courts of the power to 'make law' in diversity actions. And there is simply no respectable arguments for permitting the jurisdiction to be invoked today by a resident of the state where the federal court is held."

Friendly, *supra* note 91, at 641.

283. 304 U.S. 64 (1938).

284. *Id.* at 78.

285. The evil sought to be resolved in *Erie* was forum shopping. While the decision appears to have accomplished that goal, *but see* text accompanying note 294 *infra*, it has created new problems in its wake. *See* Friendly, *supra* note 91, at 634; Hertz, *supra* note 241. One way to avoid some of these problems is through certification of questions of state law to state supreme courts. *See* Note, *Civil Procedure—Scope of Certification in Diversity Jurisdiction*, 29 RUTGERS L. REV. 1155 (1976).

286. Hertz, *supra* note 241.

287. *See* cases cited in Hertz, *supra* note 241, at 868 n.42.

precedents,²⁸⁸ and the Supreme Court even requires federal courts in diversity cases to follow the decision of an intermediate state appellate court unless there is clear evidence that the state's highest court would decide the issue differently.²⁸⁹

Because decisions in diversity cases perform no creative function in the evolution of the common law, the same issues must wait to be resolved again in state court before they have an precedential value. The judiciary serve two functions in our legal system—to provide a decision in the case being litigated and to announce useful precedents to guide future behavior.²⁹⁰ Diversity litigation, however, serves only the first of these functions and thus results in the squandering of judicial resources.²⁹¹ This waste of federal judicial energy is especially unfortunate, given the extreme overcrowding characteristic of the federal courts at this time.²⁹² That diversity cases take more time to resolve than other litigation²⁹³ and have less impact on the law than other federal decisions provide compelling reasons to bar them from the federal docket.

Moreover, it can be persuasively argued that even *Erie's* goal of eliminating forum shopping diversity cases has not been accomplished.²⁹⁴ Thus, where a difficult question of state law is involved, a plaintiff often takes his case to federal court since, if he doesn't like the result he need not be bound by it in future litigation in state court. Similarly, when the old precedents favor the plaintiff, he will often bring his suit in federal court because he realizes that the federal judge is less likely to refuse to apply the

288. Wright, *supra* note 142, at 321.

289. Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940). This has led to some outlandish results. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 236-37 (2d ed. 1970).

290. Wright, *supra* note 142, at 323. Since diversity impedes the achievement of justice, litigants would be better off in state court. Hunter testimony, *supra* note 174, at 6-7.

291. Hertz, *supra* note 241; Wright, *supra* note 142, at 322-23 & nn.24 & 25. Not all commentators, however, take such a gloomy position.

Certainly, federal judges are not generally inept at examining state legislative history or at understanding prior rulings of state courts While state judges may bring greater experience with the law of their state to bear on the construction of state law, to the extent that this experience is the product of their prior decisions, these decisions are available for their federal counterparts to examine

Developments in the Law, *supra* note 50, at 1258. Federal judges merely construe old precedents as state courts would; if they are discredited, they will be discarded. *Id.* Moreover, federal courts in section 1983 actions also have to construe state law, and no one has suggested that they are not competent to do so. Shapiro, based on this own personal survey of the 90 or so recent diversity cases decided with full opinions, notes that 21 "made arguably useful contributions to developing state law," which leads him to conclude that diversity cases make a substantive contribution to state law. Shapiro, *supra* note 148, at 325-26.

292. See notes 1-15 and accompanying text *supra*.

293. See note 281 *supra*.

294. See note 285 *supra*.

old law, even if it is completely out of step with modern conditions, than his state counterpart. Finally, when an issue is decided against the plaintiff in federal court, he may sue in state court in the hope of convincing the state judge not to follow the federal interpretation. All this wasteful litigation not only strains the resources of both state and federal courts, but it permits plaintiffs to manipulate the dual system of courts to their own, as opposed to society's, advantage; fosters excessive and unnecessary litigation; and breeds cynicism on the part of litigants and their attorneys, all of which helps to bring the judicial office into disrepute.

If it is assumed that state courts are the interpreters of state law, then it comports more with principles of federalism to require cases in which state law must be construed to be litigated in state courts.²⁹⁵

Ultimately there should be a fair and rational allocation of the nation's litigation based upon the principle that, since state courts are the authoritative expositors of state law under our system, they should be the courts where such issues are tried, and upon the principle that federal courts should be limited to their proper role as national courts dealing with litigation affecting federal rights.²⁹⁶

It has already been pointed out that bias against foreigners²⁹⁷ and grossly incompetent state judicial systems²⁹⁸ are no longer

295. Judge Lay, of the United States Court of Appeals for the Eighth Circuit, although speaking of federalist principles in the context of state vindication of federal constitutional rights, demonstrates why principles of federalism require the elimination of diversity jurisdiction:

[T]he most prominent aspect in the evolutionary process of federalism has been the inability of the states to perform their duties. In response to this inability, or reluctance, of the states, power has been vested where it will be exercised—in Congress and the federal courts. [In recent decisions, however,] [t]he Supreme Court not only is asserting a renewed confidence in the ability of the states to perform their duties, but . . . is also encouraging states to act by giving them the opportunity to do so Thus, the Court is engaging in a federalistic experiment by giving the states the opportunity to demonstrate that the federal government need not act because the states are adequately performing.

Lay, *supra* note 91, at 13.

296. Bratton, *supra* note 91, at 354. Hunter takes exactly the same position:

We recognize the need for a proper jurisdictional balance between the federal and state court systems, and an assignment to each system of those cases most appropriate to that system in the light of the basic principles of federalism. The guiding principle is that there should be federal court jurisdiction where federal questions are at stake and state court jurisdiction where state questions are at stake and state courts are available to provide an adequate forum. The continuing existence of diversity jurisdiction is preventing our federal judges from giving the necessary attention they would like to give to other federal cases which properly belong in the federal courts and have no other forum.

Hunter testimony, *supra* note 174, at 10-11.

297. See notes 184-204 and accompanying text *supra*.

298. See notes 205-241 and accompanying text *supra*.

the problems that they were once assumed to be. Thus, no reason exists not to require the resolution in state courts of disputes concerning state law. To continue to call for the retention of diversity cases in the federal courts, on the ground that litigants receive better justice there, is demeaning to the state courts. The proposition the federal judges are better suited to handle litigation concerning federal statutory or constitutional rights, not only because of their greater expertise in this area,²⁹⁹ but also because they are more insulated from majoritarian pressures and have more sympathy than state court judges for substantive federal rights,³⁰⁰ does not bear on the ability of state court judges to decide the issues of state law that form the basis of diversity jurisdiction. The only reasons that might mitigate against this transfer of cases from the federal to the state courts would be if state judges were incompetent to deal with the new caseload or if it would so seriously overburden the state courts as to impair their continued operation.

Despite the feeling of certain commentators, and even some members of Congress, that state court judges are less competent than their federal counterparts because they serve for only limited terms³⁰¹ and are thus under the influence of local political forces,³⁰² the caliber of state judiciaries has improved dramatically. This trend has been accelerated by the states' adoption of Codes of Judicial Conduct,³⁰³ continuing judicial education,³⁰⁴ and

299. H.R. REP. NO. 893, 95th Cong., 2d Sess. 5 (1978).

300. See Stolz, *supra* note 63, at 963 (because state court judges have less sympathy for substantive federal rights, there is a feeling that they cannot be trusted with power over matters of national concern which must be entrusted in the first instance to the federal courts); *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 119 (1977) (statement of Burt Neuborne).

301. See, e.g., Neuborne, *Myth of Parity*, *supra* note 53; Reath, *supra* note 148. Carl McGowan, a federal judge, rejects the idea espoused by Anderson, *supra* note 39, that the state courts could serve as the nation's only trial courts on the ground that variations in the quality of state judicial systems with their backward provisions for judicial selection and tenure make that suggestion unwise. C. MCGOWAN, *supra* note 12, at 83-84.

302. In debating H.R. 9622, one Representative noted: "The difference between a Federal judge and a State judge is profound. A Federal judge is on Mount Olympus; he is appointed for life. A State judge is elected, and he is in the political swamps and gets those phone calls from political people. So, there is a vast difference in the atmosphere of the two courts." 122 CONG. REC. H1560 (daily ed. Feb. 28, 1978) (remarks of Rep. Hyde).

303. By 1971, the ABA's Canons of Judicial Ethics had been adopted in all but seven states. INSTITUTE OF JUDICIAL ADMINISTRATION, A GUIDE TO COURT SYSTEMS (5th ed. 1971).

304. For a history of judicial education in the United States, see Cady & Coe, *Education of Judicial Personnel: Coals to Newcastle*, 7 CONN. L. REV. 423 (1975). See also Hyde, *supra* note 231, at 173; THE BOOK OF THE STATES, *supra* note 92, at 90-91.

the institution of judicial discipline and removal procedures.³⁰⁵ Moreover, the kinds of disputes that state judges would be called upon to resolve were diversity jurisdiction eliminated are the very same type of cases they are used to deciding—tort and contract actions.³⁰⁶ For these reasons state judges are presently competent to handle the issues which would result from the transfer of diversity cases from the federal to the state courts.

It still remains to be determined, however, whether the increased caseload could be handled by existing state judicial re-

305. See, e.g., MINN. STAT. §§ 490.15 to 490.18. See also note 233 *supra*. The judicial training programs of all the states are described in NATIONAL CENTER FOR STATE COURTS, STATE JUDICIAL TRAINING PROFILE (1976).

306. State trial courts have had this kind of experience for years, even if one considers only cases that involve citizens from other states. Some cases that qualify for diversity treatment are either never brought in federal court or not removed. Numerous other cases must be brought in state court because the amount in controversy is less than the amount required to get into federal court. This latter group has increased greatly with the enactment of state long-arm statutes and the willingness of state supreme courts to construe them to permit jurisdiction as long as it is consistent with constitutional principles of due process. Thus, the only limits on a state's assumption of jurisdiction over foreigners under its long-arm statutes are those addressed in such cases as *Shaffer v. Heitner*, 429 U.S. 813, (1977) (minimum contacts test governs all assumptions of jurisdiction) and *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964) (when state's utilization of its own law under choice of law principles is permissible).

An analysis of the caseloads of various state courts also reveals the prevalence of these kinds of cases. Thus, in New York, its general trial courts received 111,018 cases in 1976, of which 21,481 were motor vehicle tort cases and 8,998 were contract cases. The total number of tort cases was 34,997. STATE OF NEW YORK, ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE, TWENTY-SECOND ANNUAL REPORT 70-71 (1977). A similar pattern emerges in Maryland. Of all the civil cases filed in its circuit courts, 31.6% were motor torts, 12.2% were other torts, and 24.7% were contract cases. ADMINISTRATIVE OFFICE OF THE COURTS, MARYLAND ANNUAL REPORT 1975-76, at 82 (1977). That almost all the tort and contracts cases in the federal courts are based on diversity of citizenship is demonstrated by the following table:

Table 1
U.S. DISTRICT COURTS
SUMMARY OF SELECTED CIVIL CASES COMMENCED
July 1976 - June 1977

Nature of Suit	Total Private Cases	Diversity of Citizenship	Percent Diversity of Citizenship
CONTRACT ACTIONS			
Insurance	3,218	3,191	99.16%
Negotiable Instruments	981	942	96.02%
Marine	3,678	-0-	-0-
Miller Act	1,009	-0-	-0-
Other Contract Actions	11,179	10,983	98.25%
TOTAL CONTRACT ACTIONS	20,055	15,116	75.34%
REAL PROPERTY ACTIONS			
Condemnation of Land	41	12	29.24%
Other Real Property Actions	1,589	1,053	66.27%
TOTAL REAL PROPERTY ACTIONS	1,630	1,065	65.34%

sources³⁰⁷ without unduly burdening them. Otherwise, it would be unwise to transfer cases from one court system to another if the effect on the receiving system impaired its ability to dispense quality justice. One of the major arguments of those who wish to retain diversity jurisdiction is that its elimination would only more seriously overburden the already bulging state court dockets and increase the already serious delay in bringing cases to trial in state courts.³⁰⁸

TORT ACTIONS

Airplane Personal Injury	673	605	89.90%
Assault, Libel, Slander, Personal Injury	691	668	96.67%
Employer's Liability Act, P.E.	1,306	-0-	-0-
Marine Personal Injury	4,950	1,180	23.84%
Motor Vehicle Personal Injury	5,470	5,346	97.73%
Other Personal Injury	6,469	6,306	97.48%
Personal Property Damage	4,174	1,388	33.25%
TOTAL TORT ACTIONS	23,733	15,493	65.28%

307. Flango and Blair suggest that a more serious problem than court congestion may be providing the increased number of supporting personnel and facilities that the transfer of diversity cases to the states will require. Nevertheless, the court administrations in such populous states as New York and Illinois favor the transfer of these cases. Flango & Blair, *The Relative Impact of Diversity Cases on State Trial Courts* 16-17 (1978) (unpublished research prepared for the National Center for State Courts).

308. According to John Frank, one of diversity's staunchest supporters, transfer of cases from federal to state dockets will simply increase the congestion in the state courts of the nation's largest cities. To demonstrate his point, he compiled the following table from the INSTITUTE OF JUDICIAL ADMINISTRATION, CALENDAR STATUS STUDY 1971 and the 1970 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1971).

TABLE OF WAITING TIME STATE AND FEDERAL

City	State, months	Federal, months
Chicago	61.7	14
Brooklyn	51.9	16
Manhattan	49.9	27
Philadelphia	46.8	37
Jersey City	35.6	26
Boston	35.0	15
Detroit	34.3	23
Los Angeles	24.3	12
Minneapolis	21.4	6
Cleveland (1970)	27.8	20
Memphis	9.9	11

Frank, *supra* note 93, at 160-61. See also Moore & Wicker, *supra* note 117, at 22 & n.116; Stolz, *supra* note 63, at 953-55 & n.44 (each year the California courts handle three to four times the business of all the federal district courts).

Those studies which have attempted to document the actual effect that the transfer of diversity cases would have upon state courts³⁰⁹ have found only a minimal impact. If the ALI proposals, which would prevent resident plaintiffs from utilizing diversity jurisdiction³¹⁰ were enacted the increase in the states' caseloads would vary from 0.8 to 7.4 additional cases per state judge with an average of 2.7 cases per year.³¹¹ A more recent study conducted under the auspices of the National Center for State Courts using 1976 figures concluded that the complete elimination of diversity jurisdiction would transfer an average of 4.12 cases to each trial court judge.³¹²

These figures may be somewhat misleading, however, because they assume that diversity cases would be redistributed evenly throughout the trial courts of the United States. This, of course, will not be the case. Not only are more diversity cases originally filed in some federal districts than in others, but the transfer of diversity cases to the states would undoubtedly place more of a burden on urban, than rural, state courts, the very courts that are already most overworked. The following tables provide some rough breakdowns of the effect of the elimination of diversity jurisdiction on the various states, using figures from 1970 (Table #1) and from 1976-77 (Table #2):

TABLE #1³¹³
DIVERSITY CASES SHIFTED (1970)

States	Total No. of State Civil Cases	Total No. of Diversity Cases	Number of State Trial Judges General Jurisdiction	Diversity Cases Shifted Per State Trial Judge (Avg)	Civil Terminations Per State Trial Judge (Avg)
1st CIRCUIT					
Maine	—	60	11	5.5	—
Massachusetts	41,047	350	46	7.6	858
New Hampshire	12,741	93	10	9.3	1,268
Rhode Island	5,130	78	13	6.0	—
Puerto Rico	—	385	—	—	—
2nd CIRCUIT					
Connecticut	19,399	193	35	5.5	508
New York	75,809	1947	225	8.7	336
Vermont	—	261	6	43.5	—
3rd CIRCUIT					
Delaware	4,203	66	12	5.5	403
New Jersey	35,777	555	78	7.1	427
Pennsylvania	25,707	2078	254	8.2	—
4th CIRCUIT					
Maryland	53,667	334	79	4.2	635

309. Burdick, *supra* note 124; Flango & Blair, *supra* note 307.

310. See notes 123-127 and accompanying text *supra* for a discussion of the ALI proposals.

311. Burdick, *supra* note 124, at 14-16.

312. Flango & Blair, *supra* note 307, at n.13.

313. Burdick, *supra* note 124, at 14-17.

N. Carolina	13,589	337	49	6.9	317
S. Carolina	—	518	16	32.4	—
Virginia	49,276	718	99	7.3	458
W. Virginia	**	319	32	10.0	—
5th CIRCUIT					
Alabama	—	774	80	9.7	—
Florida	94,411	621	144	4.3	655
Georgia	—	649	52	12.5	—
Louisiana	108,749	925	94	9.8	858
Mississippi	—	462	49	9.4	—
Texas	200,992	1506	211	7.1	927
6th CIRCUIT					
Kentucky	—	321	73	4.4	—
Michigan	86,893	756	116	6.5	730
Ohio	50,060	783	181	4.3	249
Tennessee	63,505	662	78	8.5	751
7th CIRCUIT					
Illinois	—	1148	360	3.2	—
Indiana	—	940	186	5.1	—
Wisconsin	—	227	174	1.3	—
8th CIRCUIT					
Arkansas	29,531	427	48	8.9	593
Iowa	37,965	202	76	2.7	469
Minnesota	16,924	363	68	5.3	244
Missouri	71,166	522	102	5.1	628
Nebraska	—	147	38	3.9	—
N. Dakota	4,973	47	19	2.5	247
S. Dakota	5,938	87	21	4.1	193
9th CIRCUIT					
Alaska	—	60	11	5.5	—
Arizona	—	214	51	4.2	—
California	103,749	476	416	1.1	180
Hawaii	4,335	75	14	5.4	217
Idaho	—	70	24	2.9	—
Montana	**	102	28	3.6	3
Nevada	—	92	18	5.1	—
Oregon	29,853	285	59	4.8	467
Washington	35,212	194	88	2.2	—
10th CIRCUIT					
Colorado	17,717	272	74	3.7	266
Kansas	29,826	299	61	4.9	485
New Mexico	21,501	184	21	8.8	974
Oklahoma	—	499	138	3.6	—
Utah	—	124	22	5.6	—
Wyoming	**	47	11	4.3	3
Total:	81,107	22,854			

TABLE #2³¹⁴

States	Number of Diversity Cases		General Jurisdiction Judges	Diversity Cases Shifted Per Judge 1976-77
	76	77		
Alabama	988	967	102	9.5

314. Flango & Blair, *supra* note 307.

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Alaska	69	88	17	5.2
Arizona	233	251	72	3.5
Arkansas	473	469	55	8.5
California	1,535	1,612	501	3.2
Colorado	467	335	87	3.9
Connecticut	273	277	45	6.2
Delaware	104	91	14	6.5
D. C.	477	427	44	9.7
Florida	1,130	966	272	3.6
Georgia	1,226	1,220	88	13.9
Hawaii	133	155	22	7.1
Idaho	101	107	88	1.2
Illinois	1,688	1,593	603	2.6
Indiana	728	834	149	5.6
Iowa	234	236	113	2.1
Kansas	484	545	65	8.7
Kentucky	369	394	82	4.8
Louisiana	1,103	1,174	125	9.4
Maine	97	90	14	6.4
Maryland	449	411	85	4.8
Massachusetts	604	611	46	13.3
Michigan	1,081	1,077	158	6.8
Minnesota	386	385	70	5.5
Mississippi	747	794	65	12.2
Missouri	745	826	111	7.4
Montana	135	131	28	4.7
Nebraska	229	233	45	5.2
Nevada	154	135	25	5.4
New Hampshire	195	188	12	15.7
New Jersey	823	823	201	4.1
New Mexico	281	235	32	7.3
New York	2,864	2,693	357	7.5
North Carolina	399	330	56	5.9
North Dakota	62	76	19	4.0
Ohio	946	890	296	3.0
Oklahoma	788	856	186	4.6
Oregon	384	307	67.5	4.6
Pennsylvania	2,349	2,661	285	9.3
Puerto Rico	337	382	N/A	—
Rhode Island	133	172	15	11.5
South Carolina	908	958	25	38.3
South Dakota	98	99	37	2.7
Tennessee	735	747	109	6.9
Texas	1,917	1,854	261	7.1
Utah	160	123	21	5.9
Vermont	120	121	18	6.7
Virginia	804	869	103	8.4
Washington	276	202	100	2.0

West Virginia	304	332	58	5.7
Wisconsin	259	204	182	1.1
Wyoming	91	117	13	9.0
Total	31,675	31,678	—	

* Does not include minor traffic cases

† Dispositions were used for South Dakota

** 1976 data used for this state

It is clear from these statistics that the aggregate impact on the states will not be unmanageable. The average annual rate of increase in cases filed in state courts over the last fifteen years ranges from 3 to 4% in states like Minnesota, Kansas, and Iowa to 7 or 8% in more populated and industrial states, such as Ohio and Michigan.³¹⁵ Since the natural increases in caseloads is greater than the increase in the number of diversity cases filed, their transfer to the states should have no major impact on their ability to administer justice.³¹⁶ Nevertheless, Flango and Blair find that the addition of diversity cases will be particularly burdensome on the courts of Georgia, Kansas, Massachusetts, Minnesota, Mississippi,

315. *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 179 (1977) (statement of the Honorable Robert J. Sheran).

316. This minimal impact can be seen from a comparison of the difference in civil filings and diversity filings in selected states:

	Civil Cases Filed '69	Civil Cases Filed '70	In- crease	Diversity Cases Shifted
California	97,997	103,749	5,752	476
Connecticut	17,565	19,399	1,834	153
Kansas	25,995/a	28,737/a	2,742	299
Louisiana	99,139	105,439	6,300	925
Maryland	50,384	53,667	3,283	334
Massachusetts	41,736	41,047	-689/b	350
Michigan	82,292	86,893	4,601	756
Minnesota	15,533	16,924	1,391	363
Missouri	59,037	71,166	12,129	522
New Jersey	34,341	33,892	-149/b	555
New York	69,783	75,809	6,026	1,974
North Carolina	11,880	13,589	1,709	337
North Dakota	4,344	4,973	629	47
Oregon	17,401	19,682	2,281	285
South Dakota	5,341	5,939	597	87
Washington	57,423	60,569	3,146	194

a/ The case filings for Kansas are from 1970 and 1971 respectively.

b/ In Massachusetts and New Jersey civil case filings were less in 1970 than 1969. However, the cases shifted are substantially fewer than the decrease in state cases so that a net reduction of the state caseload would still occur.

Burdick, *supra* note 124, at 18.

New York, Rhode Island, South Carolina, and Wyoming,³¹⁷ and that states such as New York, Pennsylvania, Texas, California, Illinois, Florida, Georgia, Louisiana and Michigan will have to add some judges to handle the diversity cases which would be brought in state courts.³¹⁸ Comparing these two groups of states, they conclude that Georgia and New York may need to add four or more judges, Mississippi and South Carolina may need to add three, Kansas and Massachusetts might require two, and Rhode Island and Wyoming could get along without any.³¹⁹

It is impossible to rebut completely the position taken by Frank that the urban courts which are the most overburdened will get the largest increase in caseload.³²⁰ Nevertheless, states are beginning to use more efficiently their existing judicial resources. Under the Minnesota Court Reorganization Act of 1977, for example, it becomes possible to utilize the services of more than 100 county and municipal court judges if the caseload of the 72 district court judges becomes too heavy because of the transfer of diversity cases from the federal to the state courts.³²¹ Similar flexibility in other states should go far toward alleviating whatever short-term problems occur.

Even if the transfer of diversity cases from the federal to the state courts required some additional judicial personnel, however, it would be cheaper for the few states who needed more judges to appoint them than for the federal government to increase the size of its judiciary.³²² Transferring the diversity caseload to the state courts would make the system work more efficiently and, thus, more economically. With diversity litigation out of the federal courts it would no longer be necessary for the judge hearing the case to make the threshold determinations regarding satisfaction of the requirements of complete diversity and the jurisdictional amount. All of these procedural issues, which are themselves appealable, and thus time-consuming, would be irrelevant if the case were brought initially in a state court of general jurisdiction.

317. Flango & Blair, *supra* note 307, at 12. In this regard, it is interesting to note that in his State of the Judiciary report the Chief Justice of the Massachusetts Supreme Judicial Court complained of the chronic congestion and delay in the trial courts. Hennessey, *The State of the Judiciary*, 62 MASS. L.Q. 7, 10 (1977). Minnesota, however, makes no similar complaint. See Sheran statement, *supra* note 315, at 179.

318. Flango & Blair, *supra* note 107, at 14.

319. *Id.* at 15.

320. See note 308 *supra*.

321. MINN. STAT. § 484.69, subd. 3 (1977); Sheran statement, *supra* note 315, at 179.

322. Of course, whatever additional expenses are incurred by the states in effectuating this transfer should be shared by the federal government.

Thus, these cases would take less total judicial time to resolve. Efficiency of judicial resources would also be served because the substantive issues litigated in a federal court would not have to be relitigated all over again in another lawsuit in state court.

CONCLUSION

Because the steady expansion in the demand for access to the courts is likely to continue into the future, in order to protect our court systems from total breakdown, it is necessary to alleviate the conditions that are responsible for this expansion. Whenever appropriate, litigants should be encouraged to utilize other mechanisms for dispute resolution. Even with the acceleration of diversionary procedures, however, the federal courts especially will continue to be overburdened, unless a significant portion of their caseload can be handled elsewhere. The most logical other judicial forum, which is currently underused in comparison to the number of judicial officers it employs, is the network of state courts. The task of determining what types of cases to transfer from the federal to the state courts is not an easy one, but we have attempted to demonstrate the reasons why cases based on diversity jurisdiction deserve least to be retained by the federal courts. Federal question litigation which involves interpretations of federal law or constitutional principles, although cognizable in state courts, is better resolved in the federal courts because of the greater independence of the federal judiciary from both local passions and legislative pressures and because federal judges have developed expertise in certain complex areas of federal law. Neither of these reasons, however, justifies federal retention of diversity jurisdiction. The law being interpreted in these cases is state, rather than federal, law, and the issues are ones with which state judges resolve competently in the ordinary course of their judicial careers. Moreover, because such litigation challenges neither unpopular beliefs nor the constitutionality of state statutes, there is little danger of prejudice due to the lack of insularity of state judiciaries. Finally, since local prejudice against foreigners is no longer prevalent and since the caliber of state judicial systems has improved dramatically since 1789, when jurisdiction of cases based on diversity of citizenship was given to the federal courts, there is no longer any logical reason for the retention of these cases which comprise over 20% of the federal caseload.

The time to eliminate diversity jurisdiction is now. Therefore, we strongly urge Congress to revise the Judicial Code to require litigation based on state law to be brought in state court. The Sen-

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ate should act promptly to join the House of Representatives in enacting this legislation. Then the federal courts would be better able to decide the cases they are most competent to decide—those involving federal questions.

(2)

THE SUPREME COURT,
STATE OF WASHINGTON,
Olympia, Wash., April 26, 1979.

HON. PETER W. RODINO, Jr.,
Chairman, House Judiciary Committee, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I am enclosing copies of a study done by our statistician regarding the impact of the proposed diversity bill on Washington trial courts. This study was significant to me because prior to its completion I had believed the passage of the bill eliminating diversity jurisdiction in federal courts would have a negative impact on state trial courts and I therefore opposed it. As you will see from this study, the trial of diversity cases in our state will have little measurable impact.

Our state already has a rule requiring trial of all defendants lodged in jails within 60 days and all defendants charged in criminal cases within 90 days. Even with the speedy trial rule in effect in our state, we still have capacity to handle those additional cases generated by removal of diversity jurisdiction, and can dispose of those cases far more quickly than our local federal courts are now able to do.

I therefore support wholeheartedly the position of the Conference of Chief Justices favoring the removal of diversity jurisdiction cases from the federal courts.

Very truly yours,

ROBERT F. UTTER,
Chief Justice.

Enclosures.

MEMORANDUM

NOVEMBER 14, 1977.

To: Phillip B. Winberry.

From: Bruce G. Freeland.

Subject: Impact of H.R. 9622 on Washington Superior Courts.

H.R. 9622 (copy attached), which is expected to pass the 95th Congress very shortly, will have the effect of abolishing diversity of citizenship jurisdiction in the federal district courts. Consequently, those civil suits which would be filed in the federal courts under such jurisdiction will henceforth be filed in the state courts. I expect that what impact is felt in Washington will be experienced in the superior courts.

To evaluate the size of the caseload which would revert to the superior courts. I reviewed statistics published in the 1977 Annual Report of the Director 6/30/77 which was published by the Administrative Office of the United States Courts. This report contains detailed statistics on the business of the federal courts during the period July, 1976, through June, 1977. No specific data was available on the number or nature of diversity cases filed in the two district courts for Washington. Therefore, I have prepared estimates of what the diversity jurisdiction caseload for the state of Washington was during the last fiscal year.

During the last fiscal year, diversity cases were concentrated in the civil case categories of Contract Actions, Real Property Actions and Tort Actions. The number of diversity cases filed nationwide in each category and the percentage of total private cases they represent is shown on Table I. In general, the 31,674 diversity cases filed accounted for 75 percent of the contract actions, 65 percent of the real property actions, and 65 percent of the tort actions.

The extension of these filing ratios or frequencies to the caseloads of the district courts of Washington is shown in Table II. This table indicates that there were approximately 300 diversity cases filed in Washington, of which more than two-thirds were contract actions. I feel that this is a very generous estimate and may represent an upper limit on the number actually filed. My reason for this is that the proportion of diversity cases to total cases filed is probably lower than the national average because of the geographical circumstances of the state. The opportunities for the filing of diversity cases is much higher on the eastern seaboard because of the heavier populations, smaller states and far greater tendency to travel and conduct business across state lines.

The manner in which diversity cases were disposed of nationwide is displayed on Table III. Half of the real property actions were disposed of without court action compared to only 38 percent of the tort actions and 46 percent of the contract actions. About 12 percent of all diversity cases went to "trial". For all civil cases tried in the U.S. district courts during the last fiscal year, the median length of non-jury trials was about one day or less. The median length of jury trials ranged from 2 to 3.5 days. Median lengths of trials for each type of case are outlined in Table IV.

If the estimated 303 diversity cases filed in Washington during the last fiscal year had instead been filed in the superior courts, the weighted caseload of this additional workload would have amounted to less than one-half a judicial year of work. An application of the Washington Weighted Caseload System to these cases is included in Table V. An estimate of the number of trials and trial days which these diversity cases would entail is included in Table VI.

My conclusion is that the addition of the federal diversity cases to the caseload of the superior courts will have a minimal impact. The number of cases filed in the superior courts should increase by less than one-fourth of one percent and the weighted caseload should increase by less than one-third of one percent.

TABLE 1.—U.S. DISTRICT COURTS, SUMMARY OF SELECTED CIVIL CASES COMMENCED, JULY 1976 TO JUNE 1977

Nature of suit	Total private cases	Diversity of citizenship	Percent diversity of citizenship
Contract actions:			
Insurance.....	3,218	3,191	99.16
Negotiable instruments.....	981	942	96.02
Marine.....	3,678	0	0
Miller Act.....	1,009	0	0
Other contract actions.....	11,179	10,983	98.25
Total contract actions.....	20,065	15,116	75.34
Real property actions:			
Condemnation of land.....	41	12	29.24
Other real property actions.....	1,589	1,053	66.27
Total real property actions.....	1,630	1,065	65.34
Tort actions:			
Airplane personal injury.....	673	605	89.90
Assault, libel, slander, personal injury.....	691	668	96.67
Employer's Liability Act, P.E.....	1,306	0	0
Marine personal injury.....	4,950	1,180	23.84
Motor vehicle personal injury.....	5,470	5,346	97.73
Other personal injury.....	6,469	6,306	97.48
Personal property damage.....	4,174	1,388	33.25
Total tort actions.....	23,733	15,493	65.28

TABLE II.—U.S. DISTRICT COURTS, ESTIMATES OF DIVERSITY CASES FILED IN WASHINGTON, JULY 1976 TO JUNE 1977

Nature of suit	Diversity case frequency (percent)	Eastern Washington, D.C.		Western Washington, D.C.		Total estimated diversity cases
		Private cases filed	Estimated diversity case	Private cases filed	Estimated diversity cases	
Contract.....	75.34	29	22	428	187	209
Real property.....	65.34	2	1	16	10	11
Marine personal injury.....	23.84	1	0	51	12	12
Motor vehicle personal injury.....	97.73	11	11	12	12	23
Other personal injury.....	82.93	14	12	34	28	40
Other tort.....	33.25	5	2	19	6	8
Total.....			48		255	303

TABLE III.—U.S. DISTRICT COURTS, MANNER OF DISPOSITION OF DIVERSITY OF JURISDICTION CASES, JULY 1976 TO JUNE 1977

Nature of suit	Total cases disposed	Manner of disposition							
		Court action							
		No court action		Before pretrial		During or after pretrial		Trial	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
Contract actions:									
Insurance.....	2,896	1,214	41.9	603	20.8	752	26.0	327	11.3
Negotiable instruments.....	1,006	530	52.7	255	25.3	145	14.4	76	7.6
Other contracts.....	10,485	4,878	46.5	2,329	22.2	2,225	21.2	1,053	10.0
Total contract actions.....	14,387	6,622	46.0	3,187	22.2	3,122	21.7	1,456	10.1
Real property.....	979	495	50.6	215	22.0	162	16.5	107	10.9
Tort claims:									
Marine personal injury.....	1,258	488	38.8	125	9.9	525	41.7	120	9.5
Motor vehicle, personal injury..	5,325	2,094	39.3	688	12.9	1,778	33.4	765	14.4
Other, personal injury.....	6,621	2,410	36.4	1,158	17.5	2,104	31.8	949	14.3
Other torts.....	1,211	503	41.5	272	22.5	266	22.0	170	14.0
Total tort actions.....	14,415	5,495	38.1	2,243	15.6	4,673	32.4	2,004	13.9
Total diversity cases.....	29,781	12,612	42.3	5,645	19.0	7,957	26.7	3,567	12.0

TABLE IV.—U.S. DISTRICT COURTS, MEDIAN LENGTH OF TRIALS¹ FOR CIVIL CASES² JULY 1976 TO JUNE 1977

Nature of suit	Number of trials		Median length of trial	
	Nonjury	Jury	Nonjury	Jury
Contract:				
Insurance.....	188	185	1	2.0
Marine.....	172	11	1	3.0
Miller Act.....	44	4	1	9.5
Negotiable instruments.....	101	25	1	2.0
Other contract actions.....	959	443	1	3.0
Total contract actions.....	1,464	668	1	2.0
Real property actions:				
Condemnation of land.....	64	98	<1	2.5
Other real property actions.....	274	47	<1	3.0
Total real property actions.....	338	145	<1	3.0
Tort actions:				
Airplane, personal injury.....	32	34	2	3.5
Assault, libel, slander personal injury.....	29	79	1	2.0
Employer Liability Act, personal injury.....	24	149	1	2.0
Marine personal injury.....	251	368	1	2.0
Motor vehicle, personal injury.....	192	657	1	2.0
Other personal injury.....	252	786	1	3.0
Personal property damage.....	284	123	1	2.0
Total tort actions.....	1,064	2,196	1	2.0

¹ Includes evidentiary trials (jury and nonjury), hearing on temporary restraining orders and preliminary injunctions hearings on bankruptcy petitions, and motions in reorganization proceedings.

² Includes U.S. civil cases as well as private civil cases of which diversity of citizenship cases are a subset.

TABLE V.—ESTIMATED WEIGHTED CASELOAD FOR DIVERSITY CASES IN WASHINGTON, JULY 1976 TO JUNE 1977

Nature of suit	Case weight	Filings	Weighted caseload
Contract.....	55.5	209	11,600
Real property.....	149.6	11	1,646
Marine personal injury.....	140.2	12	1,682
Motor vehicle P.I.....	140.2	23	3,225
Other personal injury.....	140.2	40	5,608
Other tort.....	140.2	8	1,122
Total.....		303	24,883
Judge year value.....			68,460
Judicial positions needed.....			0.4

TABLE VI.—ESTIMATED TRIALS AND TRIAL DAYS FOR DIVERSITY CASES IN WASHINGTON,
JULY 1976 TO JUNE 1977

Nature of suit	Cases filed	Estimated trials		Estimated trial days	
		Jury	Nonjury	Jury	Nonjury
Contract.....	209	7.0	14.0	14.0	14.0
Real property.....	11	0	1.0	0	<1.0
Marine personal injury.....	12	.5	.5	1.0	.5
Motor vehicle personal injury.....	23	2.0	1.0	4.0	1.0
Other personal injury.....	40	4.5	1.5	13.5	1.5
Other tort.....	8	0	1.0	0	1.0
Total.....	303	14.0	19.0	32.5	19.0

(d) By Hon. Daniel J. Meador

(1)

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE,
Washington, D.C., March 26, 1979.

AN ANALYSIS OF THE RESOURCES OF THE FEDERAL COURT SYSTEM CONSUMED BY DIVERSITY OF CITIZENSHIP CASES

At the request of Representative Robert W. Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, the Department of Justice has attempted to determine with some degree of specificity "the cost of diversity cases to the Federal judicial system and the amount of time expended in these cases."¹ This report is the product of our investigation in response to that request.

Initially, the report sets forth the general characteristics of diversity cases in the context of the total civil caseload. This discussion, while not directly related to resource consumption, provides some insight into the relationship of diversity cases to the entire civil caseload. Next, the report defines the cost of diversity cases in two ways: first, in terms of the time expended by the federal courts in processing and disposing of diversity cases; and second, in terms of actual financial expenditures for juries, supporting personnel, travel and miscellaneous items.

The cost in processing time is estimated on the basis of information concerning caseloads and case dispositions in federal district courts and courts of appeals. An examination of caseload data reveals the proportion of civil filings and civil appeals that are diversity cases. Case disposition data, on the other hand, provide information concerning diversity cases as a percent of cases that are terminated at various stages of the proceedings: without court action; before pretrial; during or after pretrial; or by trial. Case disposition data also allow us to establish the proportion of diversity cases that reach trial and are terminated by a jury or a nonjury trial. Using both type of data, we estimated the financial costs attributable to diversity cases. Finally, the report closes with a brief discussion of the effect abolition of diversity jurisdiction will have upon the state court systems.

A. THE DIVERSITY CASELOAD

The data in Table 1 indicate that nearly 23 percent of the total civil filings in fiscal year 1978 were diversity cases. During the same period, diversity cases constituted 24 percent of all terminated civil cases. Thus, diversity cases accounted for approximately one-fourth of the total civil caseload of the Federal district courts.

¹ Letter to Patricia Wald, Assistant Attorney General, Office of Legislative Affairs, from Representative Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, January 15, 1979.

TABLE 1.—U.S. DISTRICT COURTS CIVIL FILINGS COMMENCED AND TERMINATED IN THE PERIOD ENDING JUNE 30, 1978¹

	U.S. District courts	
	Commenced	Terminated
All civil cases.....	138, 770	125, 914
U.S. civil cases.....	46, 811	39, 399
Private civil.....	91, 959	86, 515
Diversity jurisdiction.....	31, 625	30, 496

¹ Administrative Officer of the U.S. Courts, 1978 Annual Report of the Director, table C-1 (1978).

NOTES

Commercial: Diversity cases over total civil cases equals 31,625 divided by 138,770 equals 0.2279 equals 23 percent.
 Terminated: Diversity cases over total civil cases equals 30,496 divided by 125,914 equals 0.2422 equals 24 percent.
 Commenced: Diversity cases over private civil equals 31,625 divided by 91,959 equals 0.3439 equals 34 percent.
 Terminated: Diversity cases over private civil equals 30,494 divided by 86,515 equals 0.3525 equals 35 percent.

The data in Table 2 reflect the trend in diversity case terminations during recent years. Between 1956 and 1958 the number of terminations increased rapidly. Following the 1958 amendment increasing the jurisdictional amount from \$3,000 to \$10,000, the number of terminations dropped sharply. Since 1962, however, the number of diversity cases has gradually and steadily increased.

TABLE 2.—U.S. DISTRICT COURTS, DIVERSITY CASES TERMINATED,¹ 1956-78

	Number of cases	Percent of total
1956.....	20, 557	37
1958.....	21, 805	42
1960.....	18, 120	37
1962.....	17, 498	32
1964.....	18, 368	31
1966.....	19, 145	30
1968.....	20, 403	30
1970.....	21, 633	27
1972.....	25, 382	27
1974.....	25, 990	27
1976.....	28, 225	26
1978.....	30, 496	25

¹ Administrative Office of the U.S. Courts, Annual Report of the Director, table C-4 (1956-78).

In Table 3 diversity case filings are identified on the basis of the residence of the plaintiff. Nearly 60 percent of all diversity cases filed or removed to the federal courts during fiscal year 1978 involved a plaintiff who was a resident of the state where the court was located. Another 11 percent of the cases involved a plaintiff who was a non-resident corporation business in the state. Thus, in over 70 percent of the diversity cases initially filed or removed to the federal district courts, the plaintiff was either a resident of the state or a corporation doing business in the state.

The third and fourth columns of Table 3 list the number of diversity cases originally filed in the district court—removals are not included. These data show that 54 percent of the diversity case filings were made by residents of the state. Another 12 percent of the filings were made by non-resident corporations doing business in the state. Thus, nearly two-thirds of the original filings were either by resident of the state or by non-residents doing business in the state. Stated in the obverse: of the diversity cases originally filed in the federal courts, only 33.6 percent were brought by plaintiffs who had no ties to the state.

TABLE 3.—U.S. DISTRICT COURTS, DIVERSITY CASES FILED SHOWING RESIDENCE OF PLAINTIFF,¹ JULY 1, 1977 TO JUNE 30, 1978

Residence of plaintiff	All diversity cases		Diversity cases less removals from State courts	
	Number of cases	Percentages	Number of cases	Percentages
Total.....	31, 625	100. 0	25, 953	100. 0
Resident of the State.....	18, 951	59. 9	14, 098	54. 3
Nonresident company doing business in the State.....	3, 489	11. 0	3, 141	12. 1
Nonresident company not doing business in the State.....	2, 974	9. 4	2, 833	10. 9
Other nonresident.....	6, 211	19. 7	5, 881	22. 7

¹ Prepared by the Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, Washington, O.C. (1979).

Table 4 sets forth the number of civil appeals for each of the past ten years. During that period, the total number of such appeals has increased by 85 percent. Federal question cases have increased at a slightly greater rate (96 percent). Diversity appeals, on the other hand, have increased by 48 percent.

During the past fiscal year, however, civil appeals did not follow this pattern. The increase in total appeals was only 1.7 percent. The trend of an increased number of appeals in federal question cases reversed itself—the number of such appeals actually decreased by 3.7 percent. At the same time, diversity appeals increased by 4.8 percent over the previous year. It is difficult to assess whether these figures are indicative of a new trend, or simply a shift in growth patterns peculiar to the period.

TABLE 4.—U.S. COURTS OF APPEALS, NATURE OF SUIT OR OFFENSE OF APPEALS ARISING FROM THE U.S. DISTRICT COURTS¹

Fiscal year	Total civil	Percent change 1969-70 to 1977-78	Federal question	Percent change	Diversity cases	Percent change
1969.....	6, 020	16. 3	2, 750	22. 9	1, 215	2. 3
1970.....	7, 001	8. 6	3, 379	9. 4	1, 233	4. 3
1971.....	7, 601	10. 5	3, 697	9. 6	1, 286	16. 6
1972.....	8, 399	5. 7	4, 053	10. 6	1, 499	-2. 2
1973.....	8, 876	6. 2	4, 483	. 8	1, 468	4. 0
1974.....	9, 424	. 7	4, 521	3. 4	1, 527	14. 3
1975.....	9, 492	. 1	4, 267	12. 6	1, 745	-1. 7
1976.....	10, 404	5. 5	5, 267	6. 1	1, 714	- . 6
1977.....	10, 980	1. 7	5, 589	-3. 7	1, 713	4. 8
1978.....	11, 162	5, 383	1, 796

¹ Administrative Office of the U.S. Courts, 1978 Annual Report of the Director, table B-7 (1978).

In summary, the civil caseload in the federal courts has increased dramatically during the past decade and a half. There is no indication that this trend will change in future years. The bulk of the increase is attributable to federal question cases; however, diversity cases have also increased substantially. During the last few years, diversity cases have constituted a fairly constant 25 percent of the district court civil caseload, and all indications are that this percentage will continue, absent changes in the law.

B. PROCESSING DIVERSITY CASES

While diversity cases comprise 24 percent of all civil case terminations in the district courts, they are disproportionately over-represented in certain categories of terminations and under-represented in others. For example, of the civil cases

terminated, after pretrial, 43 percent (instead of the 24 percent that would be expected if diversity cases were proportionally represented) were based on diversity jurisdiction (Table 5). Thirty-nine percent of the civil cases that went to trial were diversity cases. Furthermore, 64 percent of civil jury trials were diversity cases. Thus, diversity cases were two and a half times more likely to be disposed of by jury trial than would be expected, given their proportion of civil caseload. Indeed, twelve percent of all diversity cases are terminated by a trial—a rate twice that for all other civil cases. Of all private civil cases, diversity motor vehicle personal injury cases (114.3 percent) and civil rights cases (15.1 percent) had the highest percent of cases reaching trial. Other types of diversity cases, such as marine personal injury, "other personal injury," and "other tort," also exceeded the average rate of cases terminated by trial.

On the other hand, diversity cases constituted only 13 percent of cases terminated before pretrial. Clearly, fewer diversity cases than would be anticipated are terminated during this stage of the proceeding.

TABLE 5.—CIVIL CASES TERMINATED: U.S. DISTRICT COURTS¹

	Total	No court action	Total	Before pretrial	During/ after pretrial	Court action			Percent reach- ing trial
						Total	Non- jury	Jury	
Total civil.....	123, 153	45, 336	77, 817	48, 719	19, 725	9, 373	5, 842	3, 531	7. 6
U.S. civil.....	36, 684	14, 350	22, 334	18, 173	2, 706	1, 455	1, 305	150	4. 0
Private civil.....	86, 466	30, 986	55, 483	30, 546	17, 019	7, 918	4, 537	3, 381	9. 2
Diversity cases.....	30, 496	12, 239	18, 257	6, 220	8, 388	3, 649	1, 374	2, 275	12. 0
Marine personal injury.....	1, 177	409	768	99	521	148	59	89	12. 6
Motor vehicle personal injury.....	5, 333	2, 086	3, 247	724	1, 769	763	105	658	14. 3
Other personal injury.....	7, 128	2, 354	4, 774	1, 506	2, 293	975	136	839	13. 7
Other torts.....	1, 294	515	779	278	334	167	65	102	12. 9
AO other diversity.....	7	3	4	3	-----	1	1	-----	14. 3
Diversity, total civil (percent).....	25	27	23	13	43	39	24	64	-----
Diversity, private civil (percent).....	35	39	33	20	49	46	30	67	-----

¹ Administrative Office of the U.S. Courts, 1978 Annual Report of the Director, table C-4j(1978).

These figures suggest that diversity of citizenship cases occupy the time and resources of the federal judiciary out of proportion to their number. Not only are fewer diversity cases disposed of prior to trial, but also they constitute almost two-thirds of all civil jury trials—and jury trials, typically, are longer than bench trials.

C. Cost Savings Upon Abolition of Diversity Jurisdiction

Elimination of diversity cases from the federal courts will considerably reduce the amount of fees paid to jurors. The Budgetary Impact of Diversity Cases Report prepared by the Financial Management Division of the Administrative Office of United States Courts determined that in fiscal year 1978, there were 1,946 trials in diversity cases⁷ and that these trials occupied a total of 7,554 days.⁸ The estimated cost of these trials is four and one half million dollars per annum. The process used to determine this amount is set forth in Table 6.

⁷ The Administrative Office advises that there were 1946 diversity trials conducted in the federal courts during the period July 1, 1977 to June 30, 1978. That figure differs from the number reported in Table 5, *infra*. That table reports the number of diversity cases terminated during the same period in which there was a jury trial. Some cases finally terminated during that period were actually tried during the previous year and accordingly would be reflected in the data compiled for that year.

⁸ During the period July 1, 1977 to June 30, 1978 a total of 12,689 days were devoted to civil jury trials. Administrative Office of the United States Courts, 1978 Annual Report of the Director, Table C-8 (1978). Of that number 7,554 days (59.5 percent) were spent trying diversity cases.

Table 6: *Elimination of diversity cases cost savings for: "fees of jurors and land commissioners"*⁹

A. Number of diversity trials (July 1, 1977-June 30, 1978)-----	1, 946
B. Length of jury trials:	
(1) 350 trials for 1 day-----	305
(2) 580 trials for 2 days-----	1, 160
(3) 437 trials for 3 days-----	1, 311
(4) 550 trials for 4 to 9 days; average, 6½ days-----	3, 575
(5) 64 trials for 10 to 19 days; average 14.5 days-----	928
(6) 10 trials for 20 days and over; average 5 trials for 25 days, 5 trials for 30 days-----	275
Total trials 1,946—and trial days-----	7, 554
C. It is estimated that civil trials cost about \$600 per day-----	x600
Rounded total-----	\$4, 500, 000

In addition to the reduced costs for jurors, other savings can be expected. Since diversity abolition will substantially reduce case filings, it is anticipated that the staffs of the clerks' offices in the federal courts can be reduced. The Financial Management Division of the Administrative Office estimates that some 240 positions can be eliminated. Based upon this estimate, a savings of 4.3 million dollars each year will be realized, calculated as follows:¹⁰

(a) Salaries and supporting personnel:	
240 positions-----	\$3, 200, 000
Benefits-----	300, 000
(b) Travel and miscellaneous expenses: 240 positions at \$1,600 (recurring expenses)-----	390, 000
(c) Space and facilities: 200 sq. ft. each at \$1,700 times 240-----	410, 000
Total-----	4, 300, 000

Thus a total annual saving of \$8.8 million can be expected (\$4,300,000 for supporting staff and \$4,500,000 for juror fees).

It is not anticipated that this saving will be realized immediately, since there will be approximately 30,000 diversity cases pending on the date the legislation goes into effect. The Administrative Office estimates that these cases can be disposed of over a three-year period. The phase-out of these cases and the attendant cost is illustrated in Table 7.

TABLE 7.—RECAPITULATION OF SAVINGS BY FISCAL YEAR: U.S. DISTRICT COURTS¹¹

	Manpower and expenses	Fees of juror	Total
Fiscal year:			
1981-----	\$2, 150, 000	\$2, 250, 000	\$4, 400, 000
1982-----	1, 433, 000	1, 500, 000	2, 933, 000
1983-----	717, 000	750, 000	1, 467, 000
Total-----	4, 300, 000	4, 500, 000	8, 800, 000

¹¹ Id.

These data are based upon the expectation that 50 percent of the cases will be reduced each year by the amount that it will cost to process the pending remaining 17 percent in the third year. Thus, the projected annual savings will be reduced each year by the amount that it will cost to process the pending cases, with the actual savings increasing each year. By the end of the third year, it is expected that the backlog of pending diversity cases will have been eliminated, and the projected savings of 8.8 million dollars will be realized each year thereafter.

Thus, there will definitely be some savings in terms of manpower and juror expenses as soon as fiscal year 1980, and we can look forward to greater savings once the presently pending diversity cases have totally cleared the system. (It is worth noting that these estimates of projected savings are fairly conservative and the actual savings may be even greater.)

⁹ Administrative Office of the United States Courts, Financial Management Division, *Budgetary Impact of Diversity Cases Report* (1979).

¹⁰ Id.

D. IMPACT OF ABOLITION UPON STATE COURTS

Some concern has been expressed about the impact of diversity cases on state trial courts. Will the additional cases create an unbearable burden to the state courts, or can these cases readily be absorbed by them?

A study conducted by the National Center for State Courts revealed that the impact of diversity cases on state courts will increase the caseload in state courts by an average of 1.03 percent.¹² The transfer of diversity cases, however, will not affect all states equally. The findings demonstrate that, on the basis of 1975 figures, the abolition of general diversity of citizenship cases would result in increased caseloads in the state courts that would range from a low of 0.14 percent in the least affected court to a high of 3.58 percent in the most affected court.

The study also calculated the range of additional state court judges needed for handling the diversity cases transferred to those courts. In the states in which the impact of diversity cases is disproportionately high, the number of additional judges that will be needed is somewhat higher than for other states. States with larger caseloads may require several additional judges, while less congested states would require fewer judges.

On the other hand, a majority of the states will be capable of handling the diversity cases without additional judges. In some states the report noted that, "although the impact of the transfer of diversity cases would be disproportionately high . . . the court system in these states should be able to handle the extra filings without the addition of new judges."¹³

The study's conclusions are in agreement with those reached by Minnesota Chief Justice Robert J. Sheran. He remarked in the 1976-77 Minnesota State Court Report that:

While the transfer of the cases would add materially to the burdens of state courts in some areas which have serious backlogs of their own, they could be handled in most instances without major additions to state judicial resources.¹⁴

Further support for the view that the state courts will not be adversely affected by the abolition of diversity jurisdiction can be found in a resolution adopted by the Conference of Chief Justices (of the state courts) in August 1977. That resolution noted that the state courts "are able and willing. . . [to assume] all or part of the diversity jurisdiction presently exercised by the federal courts."

E. CONCLUSION

In summary, it seems clear that diversity cases consume a disproportionate amount of the time and resources of the federal courts. Abolition of diversity is expected to result in savings of 8.8 million dollars each year once the pending cases are terminated. Finally, although some state court systems may have to increase judicial resources to accommodate the new cases, the majority of state court systems will be able to absorb these cases with little or no difficulty.

(2)

THE FEDERAL GOVERNMENT AND THE STATE COURTS

(By Daniel J. Meador*)

THE ROBERT HOUGHWOUT JACKSON LECTURE BEFORE THE NATIONAL COLLEGE OF THE STATE JUDICIARY¹

To be asked to participate in the Robert H. Jackson Lecture series is a distinct privilege for any lawyer. Justice Jackson was one of the eminent lawyers and judges of our day. He provides an enduring model of professional competence and integrity. Among his many qualities I think most often of his analytical mind and his mastery of the English language. I saw Justice Jackson only twice. In September 1954, shortly after I had arrived to clerk for Justice Hugo Black, he

¹² Flango and Blair, *The Relative Impact of Diversity Cases on State Trial Courts*, State Court Journal 20, 23 (Summer 1978).

¹³ *Id.*

¹⁴ *Id.* at 24.

*Assistant Attorney General of the United States.

¹ The views expressed here are those of the lecturer and do not necessarily represent the position of the Department of Justice or of the Attorney General.

dropped by to chat. A couple of weeks later, I passed him in the corridors of the Supreme Court when he was on the way to a Court conference. Five days later he was dead. The law clerks for all the justices sat together at his funeral in the National Cathedral in Washington. Seventeen years later, almost to the week, I was again at a funeral in National Cathedral, this time for Justice Black. In my memory's eye, these two strong-minded men are linked in this curious way. They had a genuine respect for each other, despite all of the controversy that swirled about them at one time.

It is also a privilege to participate in this Lecture series because it gives me an opportunity to visit the National College of the State Judiciary. Nothing more clearly symbolizes the new era in the American judiciary than does the flourishing activity in judicial education especially as embodied in this institution. Twenty years ago this was unknown. It is now clearly an idea whose time has come. There is a substantial rising interest in formal educational programs for judges at all levels of the judiciary, state and federal. This is one of the most promising signs that the American courts, while beset with troubles of many sorts, are alive and thriving, with the promise of continued vitality. All of you are to be congratulated on participating in this essential aspect of a career on the bench today.

Out of a wide range of subjects which we could usefully discuss, I have chosen to talk about the federal government and the state courts. This is a subject in which you and I presently have a mutual interest, and it is a subject which raises provocative questions about the future shape of American government. Trends are afoot which could lead us to quite a different governmental arrangement from that which we have known in our own time and indeed from the beginning of our constitutional government.

This subject can be put into perspective by starting with a brief review of history. Then we can survey the contemporary scene, underscoring the changes which have come about in the mid-20th century and noting the significant trends. Finally, I shall attempt to peer through the midst of the future and suggest some possibilities which may lie ahead.

In many respects the evolution of the state courts' relationship to the federal government is part of the general evolution of government in this country. Most discussions of that subject, however, focus on executive and legislative powers. Little attention has been given specifically to the peculiar relationships of the state judicial systems and the federal government as a whole. It is hardly a secret that the state courts today occupy a radically altered position in relationship to the federal government than that which they occupied originally and for well over a century after the formation of the federal union. But the full dimensions and the ramifications of the changes may not be widely understood. It is my belief that we are in a transition period which could lead to a judicial structure quite different from the original state-federal design.

We begin with some elementary observations. When the members of the Constitutional Convention convened in Philadelphia in 1787, courts already existed in the thirteen newly independent states. Each of the states was an autonomous entity. Each had its own courts, with a structure and a jurisprudence largely inherited from England, though heavily infused with North American frontier customs and conditions. At that time, each state was like England itself, in that each had a unitary government and unitary set of courts. There was no federal overlay or dual governmental structure such as that brought into being by the work of those men in Philadelphia.

The adoption of the Constitution and the passage of the Judiciary Act of 1789 set the stage for all that has followed. The Constitution created a dual sovereignty throughout the United States. Alongside of, or on top of, the state courts, a federal judicial system was erected. But for many decades the position of the state judiciaries was not altered very much. In the beginning, the trial courts of the new federal system were given very little jurisdiction that impinged in anyway upon the state courts.

Perhaps the most important element of change at the trial level was the shift of admiralty jurisdiction from the state courts over to the new federal district courts. The Supreme Court was given jurisdiction to review state court judgments, but this power was exercised only scantily for many years. In the first decade of its existence, the Supreme Court reviewed only seven state court decisions, and for the next several decades it reviewed about an average of one state judgment a year. The state judges, by virtue of the Federal Supremacy clause, were compelled to apply federal law whenever it came into play, but federal law was so skimpy in the early decades that this posed little or no added

burden on the state judges. There was, of course, no remote hint from the beginning and throughout the 19th century of any federal funding for the state judiciaries. Any suggestion along that line would likely have been thought of as subversive or revolutionary or the product of a deranged mind.

Thus, in an oversimplified way, it might be said that for nearly a century after the creation of the federal union the only impingement of the federal government on the state courts was the occasional review by the U.S. Supreme Court of a State Supreme Court decision. Otherwise, the state courts went their way largely unaffected by the coexistence of the federal government.

The situation began to change—and the seeds for radical alteration were planted—in the wake of that water shed disaster in American history, the War Between the States and Reconstruction. The state judiciaries were directly affected by the great upsurge of national sentiment and increasing assertions of federal authority which occurred during that era. A major development was the opening of the federal trial courts to some business which had always been handled exclusively by the state courts. For example, in the late 1860's Congress broadened removal to the federal courts of diversity of citizenship cases. And, in that same period, Congress for the first time provided writs of habeas corpus for persons detained under state authority. Most significant of all was the adoption of the Fourteenth Amendment in 1868, imposing directly upon the states, as a matter of federal law, the constraints of due process and equal protection. The immediate effect of these measures was not great, but in the long run they have served to channel to the federal district courts a large volume of litigation which would otherwise have been confined to the state courts, subject only to the possibility of U.S. Supreme Court review of the final state judgment.

More was yet to come. In 1875, Congress enacted, for the first time, a general provision authorizing federal trial courts to entertain suits arising under federal law. It is anomalous that up until that time there had been no general federal question jurisdiction in the federal trial courts. The 1875 provision has had enormous consequences on the business of both the state and federal courts. Since that time, plaintiffs with claims based on federal law have been able to initiate actions in the federal courts, rather than in the state courts, and they have done so in vastly increasing numbers in recent decades.

Thus 1875 jurisdictional grant combined with the Fourteenth Amendment to produce the 1908 Supreme Court's decision in *ex parte Young*. That decision held that federal courts could enjoin state officials from conduct in violation of the Constitution. It worked an enormous shift of authority. In effect, it put the federal district courts in the business of supervising the constitutionality of state official activity. A federal trial court with authority to hear evidence, decide facts, and issue injunctions is armed with a powerful device, one far more potent than U.S. Supreme Court review of a final state supreme court judgment. Constitutional questions which would previously have been decided initially by the state courts are thus channeled instead through the federal system. Not only has this given the federal courts a vastly enhanced amount of business, but it has also shifted ultimate authority over many important economic and social questions into the hands of the federal judiciary.

It was not until the middle of this century that the full fruits of the 1867 habeas corpus statute materialized. That statute, combined with the Fourteenth Amendment, has now been interpreted by the Supreme Court to permit federal district courts to review state criminal cases in a pervasive way. Any federal Constitutional issue concerning the state criminal process can now be asserted in the federal trial courts following an otherwise final state court conviction. The range of those issues has also been broadened considerably through the Supreme Court's expanded construction of the Fourteenth Amendment, as applied to the state criminal process. Here again is a major reallocation of state-federal authority, about as large as that worked by *ex parte Young*. The federal judiciary has acquired vastly enhanced powers to supervise the state courts in criminal cases.

The last major development I wish to cite is the blossoming of Section 1983. Between 1875 and 1939, there were only 19 reported cases brought in the federal courts under this statute. Last year alone, however, 7,752 were filed in the federal courts. In effect, this statute, as presently constructed, converts many state tort and property cases into Constitutional cases thereby opening the way for their litigation in the federal district courts.

These sketchy highlights from our history are enough to underscore a huge growth in federal judicial business, much of which has been diverted from the

state courts. These highlights also show a greatly enhanced federal judicial power over all aspects of state activity. The growth and relative power of the federal judiciary is consistent with the general pattern of growth of federal power in other areas over the last hundred years, and particularly in the middle decades of the 20th century.

There have been only two developments inconsistent with this pattern. One was the Supreme Court's decision in 1938 in *Eric R.R. v. Tompkins*, holding that state decisional law was to be as binding on federal judges as state statutory law. This meant that in diversity of citizenship cases federal courts were no longer to exercise an independent, creative common law function in formulating decisional rules. The *Eric* decision reallocated power to the state courts; it made the state courts the authoritative expositors of state common law. Federal judges were to follow them in diversity cases, which after all involve essentially state law questions. This holding deprived the federal judges of a large power of creative development of common law doctrine, and shifted responsibility for that back into the state courts.

Diversity jurisdiction itself is the subject of the other development which promises to shift back to the state courts a large amount of business. Bills are now pending in Congress to restrict that jurisdiction in one degree or another and it is likely that this Congress will enact a bill which will limit federal diversity jurisdiction at least to some extent. If so, a significant number of cases will be reallocated to the state courts. However, in no single state will the volume be huge. The Conference of Chief Justices, at their annual meeting last August, adopted a resolution stating that the state courts are prepared and willing to assume whatever increased volume of business results from the restriction of federal diversity jurisdiction.

But even assuming a restriction of federal diversity jurisdiction and considering the *Eric* decision, we are still left with a substantial net gain in federal judicial business and power, compared to the situation which existed a century ago. The state courts, nevertheless, remain with large and ever growing volumes of business. Our system is still structured on the basic premise that the state courts are the primary forums for deciding the controversies which arise in the great mass of day-to-day dealings among citizens. Contract, tort, property, domestic relations, and criminal law matters are all dealt with largely by the state courts. In sheer volume, the totality of state court business is enormously greater than the totality of federal court business. Moreover, in number of judges, the state court systems far exceed the federal system.

Thus far we have been speaking largely of a net growth of federal jurisdiction. But this does not reveal the full dimensions of the present relationship between the federal and the state courts. At the same time that federal judicial power has increased, the state and federal court systems are drawing closer together. There are now more points of contact between the state and federal court systems. There is also growing uniformity in the law being applied by both and in the rules of procedures being used.

Some forty states have adopted rules of civil procedure which are virtually identical to the Federal Rules of Civil Procedure. Greater uniformity in the law of evidence may likewise follow the adoption of the Federal Rules of Evidence.

Some of the growing uniformity in the law being applied by both systems is the result of decisions under the Fourteenth Amendment. In criminal cases, for example, there has developed a closer relationship between federal and state law enforcement procedures and both state and federal courts decide a large number of identical due process and equal protection questions. Another example is diversity cases, in which federal courts are deciding issues of law identical to those being decided in the state courts. FELA cases may be brought in both state and federal courts so that both systems decide those matters. Litigation involving the legality of state official action takes place in both systems.

In addition, there is growing uniformity of the law among the states. Largely as a result of the work of the National Conference of Commissioners on Uniform State Laws, much state law has been revised resulting in a higher degree of nationwide uniformity. And the American Law Institute continues its work on the restatements thereby encouraging uniformity in development of the common law.

It is fair to say that the courts of the nation, state and federal, are today deciding more legal questions in common than ever before. Also, there is greater possibility now for federal judicial involvement in matters which formerly would have been the exclusive province of the state courts.

There are other developments pulling the systems closer together. The Conference of Chief Justices more and more concerns itself with federal matters and federal-state relationships. This body also serves to pull together the judiciaries of all the states. The state and federal judges in 40 states have formed judicial councils which facilitate continuing contact and dialogue between the two systems at the state level. Also, recognizing an identity of many of their concerns, the appellate judges of the federal courts have joined state appellate judges in a single, voluntary association within the American Bar Association. It has been suggested that state and federal trial judges do the same. The National College of the State Judiciary is a growing and effective force for homogenizing the state judges nationwide.

Another significant development in this unfolding saga of our dual court systems is the creation of a national center for each. In December 1967, the Federal Judicial Center was established followed in 1972 by the National Center for State Courts. These two central, national Centers have many interests in common and they have collaborated on a variety of projects and activities. The existence of these Centers makes it possible for the federal and state judiciaries to interrelate in ways that would not have been possible without them and increasing collaboration is predictable. Moreover, like the Conference of Chief Justices and the National College of the State Judiciary, the National Center for State Courts serves in a new way to unify the 50 state court systems.

The accretion of federal jurisdiction, the growing dominance of the federal judiciary and the drawing together of the two systems are reminiscent of developments in England centuries ago. After the Normans arrived and established the seeds of a central national government, there arose in England for the first time some central, national courts—Common Pleas, King's Bench, and the Exchequer. But at the beginning and for many, many years, these courts had very limited jurisdiction. The great bulk of everyday dispute settlement rested in the local courts of various sorts—county courts, federal courts, and others. Gradually, however, as the centuries passed, the jurisdiction of the central courts increased. By various procedural inventions and fictions they drew unto themselves an ever increasing amount of judicial business which previously had been in the hands of the local courts. Ultimately, the local courts were eclipsed, and the central courts became all embracing in their authority.

Whether the trends which we observe in this country will lead to such a result is one of the fascinating questions to ponder. There are some parallels. For example, one of the instruments used in England by the central royal courts to gather jurisdiction was the writ of habeas corpus. Through that writ, cases could be taken from the local tribunals over into the central courts. As noted above, it is largely through the habeas corpus writ that we have developed what has been characterized as the federalization of the state criminal process. The superimposing of Constitutional doctrine on state tort and property law, through Section 1983 actions, also has some parallels in the English historical development. Of course, in this country, the state courts represent a much more firmly established and deeply entrenched system than did the local courts in England. Moreover, the federal-state division of authority is much more sharply etched in our system than was the national-local authority in England.

Returning now to the contemporary scene in the United States, I have not yet mentioned the most radical and novel development of all. This is the rise of federal funding for the state judiciaries. There was, of course, no federal funding whatsoever or state courts at the beginning of the American Union or for the next century and three quarters. The first significant step in this direction came with the creation of the Law Enforcement Assistance Administration in 1968. This federal agency was created to assist the states in what was intended to be a massive war on crime. Funds were to be provided to bolster the criminal justice capabilities of the states. While no one previously had specifically considered the courts to be part of the criminal justice system, they quickly came to be so perceived. LEAA money began to be channeled to the state courts, directly and indirectly. At first a trickle, it has grown to sizable sums. Grants to state courts in 1969 from LEAA amounted to \$2.5 million; in 1976 the annual figure was \$140 million. To date a total of \$715 million has been channeled through LEAA to the state judiciaries. Such financing is openly advocated. State judges are appearing before Congressional committees urging federal funding for the state courts. Indeed, the prospect of any diminution in the present level of funding is viewed with dismay by judges and court administrators in many states. Strenuous lobbying and public

relation efforts are mounted to ensure that federal funding continues to flow and to increase. Along with this, of course, goes the demand for safeguards around the independence of the state judiciaries. On this federal funding question, there has seldom been a more dramatic turnabout. It was only a few years ago that many voices could be heard resisting any federal money for the state judiciaries. Faced with stringent state budgets, however, the lure of the federal dollar has become irresistible.

The National Center for State Courts has also provided a focal point for federal funding and attention. Since its creation the Center has been largely funded by federal grants from LEAA. And today many people are urging that the Center and its activities be funded by a direct appropriation from Congress. The Attorney General has endorsed this idea, and it is not far-fetched to believe that such arrangements may come about. With direct federal funding going to the State Court Center, it is not a great additional step to contemplate federal funding going directly and expressly to the state courts themselves, rather than indirectly through LEAA. Indeed, this is being urged now.

Unquestionably, federal appropriations are serving to bring the state and federal court systems together in new ways. The federal government is investing over \$30 million a year through LEAA in justice research directed primarily at matters of state concern. There is wide agreement that federal funding for justice research should continue, but that it should be broadened to include civil as well as criminal justice matters, state and federal. The newly created Federal Justice Research Fund is a move in that direction. That Fund, administered by the Department of Justice, is to be used to support research in all aspects of the justice system, without the LEAA-type of restrictions. Consideration is being given to creating a new federal structure to administer justice research funds. Whether such a structure would be modeled on the National Institute of Justice, as recommended by the American Bar Association or be contained within the Department of Justice or elsewhere, is as yet undecided.

Federal funds to improve and support state courts are increasingly viewed as a necessity because state courts are chronically underfinanced by their own legislatures. In a recent letter to the Attorney General, commenting on the proposed restructuring of LEAA, the National Center for State Courts endorsed the position of the Conference of Chief Justices, that federal funding should continue for The National College of the State Judiciary, for the National Center for State Courts and for the state judiciaries themselves. In encouraging such funding the Center and the Conference offer warnings and admonitions that federal money must be supplied to the state courts with few or no strings because of the nature of the recipient institutions. The Conference says, for example, "there is a proper federal role in improving the justice system but it must be performed in a manner that respects the identity and independence of state courts." While those are laudible sentiments, similar admonitions have preceded federal funding in other areas of American life. But inevitably, federal regulation tends to follow federal money at least where the money flows in substantial amounts over a period of time. The bureaucratic grip of the federal government, through HEW, on the colleges and the universities of this country rests entirely upon the flow of federal money to those institutions, sometimes in relatively small amounts to each. It is not clear that the state courts will be in any stronger position to resist the federal power that follows federal money than the institutions of higher education which, like the state courts, make legitimate and historically well-grounded claims to independence.

Only a modest imagination is needed to foresee the development of federal standards for state courts in order for them to be eligible for federal appropriations. And, of course, once such standards are promulgated, some arrangements must be provided to determine whether they have been met. While this need not in theory impair the independence of state judicial decisions, the appearance of such impairment will be unavoidable. Any similar kind of overseeing of the federal courts by Congress or the Executive would almost certainly be thought unconstitutional. It would be strange indeed for the state judiciaries to be subject to greater federal authority than are the federal courts. Yet that prospect is not far-fetched and may indeed already be happening under present funding arrangements.

The federal Executive Branch has in fact entered the picture in a new and potentially significant way. We have a new Attorney General who has espoused the view that the Department of Justice should increasingly exercise a national

leadership role in justice at all levels. He has advocated that the Department take the initiative in creating a "national policy on justice" by bringing together local, state and federal groups to collaborate and develop policies to improve the quality of justice and the courts at all levels. To promote this view, since taking office in January 1977, he has met with groups of state Chief Justices, Governors, state attorneys general, representatives of the National Center for State Courts, and others concerned with justice at the state and local levels. He has established a new office within the Justice Department called the Office for Improvements in the Administration of Justice to develop proposals which will affect state as well as federal courts.

For example, this Office, with LEAA funding, is establishing experimental Neighborhood Justice Centers in three cities with the announced objectives of establishing more if these are successful. The disputes which will come to these Centers would otherwise go to state tribunals if they went to court at all. Thus, the Department of Justice seems to be assuming something of the role of a ministry of justice with nationwide, rather than strictly federal, concerns.

There is no doubt at all that we have reached a point now where a jurisdictional and financial interrelationship exists between the state and federal courts and between the state courts and the federal government that was unknown and un contemplated a century ago.

This situation and its implications for the future require that we rethink the structure of the entire American judiciary. It is possible that the combined effect of all the developments noted here will lead us along the route of the English experience. A plausible argument can be made that the trends point toward the emergence of a unitary, national system of courts. The growth of federal judicial power, the increasing uniformity in legal rules, the blending of functions, and the necessity of federal funding for state courts all could be read to suggest that eventually. Yet there are substantial practical and Constitutional reasons for believing that that will not happen and that, instead, some other arrangement will emerge.

One possibility would be a quasi-merger of the federal judiciary with the state court systems. Machinery could be developed within the federal judicial branch to administer federal monetary support for the state courts and to integrate those courts more closely with the federal system. This might be done in ways which would not threaten the independence of the state courts, as would federal executive or legislative supervision, but yet would bring about a smoother meshing of the judiciary nationwide. For example, the Administrative Office of the U.S. Courts, which already administers Congressional appropriations for the federal judiciary, could also serve to administer Congressional appropriations for the state judiciaries.

Another possibility, apart from funding considerations, lies in the reallocation of judicial business between the systems. Duplicating and overlapping jurisdictions could be substantially reduced, and the federal appellate structure could be rearranged so as to integrate state and federal business in a more efficient way. The pending reduction or abolition of diversity jurisdiction is a move in that direction. Another idea along this line is the routing of all state criminal cases, which contain federal issues, to the U.S. Courts of Appeals, thereby bypassing federal trial court review.

Still other ideas may be gleaned from the judicial organizations of other federalisms. In Australia and Canada, for example, all state court decisions are reviewable by a federal tribunal which is empowered to decide, with binding force, all legal questions, state and federal. In the Federal Republic of Germany, there are no federal trial courts at all; the same, with rare exceptions, is true in Australia. The courts of first instance in both countries are provided by the states, and cases flow into a federal forum only at the appellate level.

While these arrangements in other countries may be suggestive, it is unlikely that any one of them furnishes an exact model which would be feasible in the United States. We have our own long-standing Constitutional arrangements and legal habits and customs which are likely to lead us to a uniquely American scheme.

The one thing that does seem clear from the conditions described here is that we are in a time of transition. I think it is important for all of us to recognize that. Actions taken or not taken over the next few years will definitely have an impact on the eventual design of the judicial processes in our country. We can, by steps we take or positions we advocate, either have a hand in shaping the direction of events, or events will control us. It seems preferable to me to try to

address our situation rationally, and make an effort to design structures best suited to our society and to the conditions of the late 20th century. Otherwise, we will simply drift into new arrangements which may or may not be desirable.

There are serious values and interests which must be accommodated in any American solution. There are, for example, values in decentralization; but there are also values to be served by a more efficient integration nationwide of our judicial systems. Above all, there is the enormous value to our society of the unique role of the judges, state and federal. Whatever we do, through all the restructuring, reorganizing, financing and streamlining, we must not impair that essential role: the deciding of controversies under law. The courts must be the place where citizens can go to have their disputes with each other or with the ever more intrusive other branches of the government decided by detached, disinterested judges, applying evenhandedly the laws and principles that govern us all. All other functions of government can be performed by other agencies.

As trial judges in the state courts, you are in the front line of the legal system. You are in an excellent position to contribute ideas to the development of new structural and procedural arrangements. The National College of the State Judiciary can also play an important part in this development. If the best minds of the legal order can be put on this problem, we may emerge from this time of transition into a far better judicial system than we have yet had.

APPENDIX III—MISCELLANEOUS CORRESPONDENCE

(a)

ISRAELSON & JACKSON, P.A.,
Baltimore, Md., March 6, 1979.

Congressman PETER W. RODINO, Jr.,
House Judiciary Committee,
House Office Building,
Washington, D.C.

DEAR MR. CONGRESSMAN: I write you as a member of the House Judiciary Committee because I believe that you are genuinely interested in the welfare of the people who elected you.

Example (1): If one of your district leaders were riding down the interstate highway nearest his home and a tractor-trailer or automobile from another state rear-ended him, causing severe injury or death, would you expect—and be satisfied—that he or his widow would have to track down the out-of-state motorist even though it were the other end of the country, sue the party at fault, entailing his engaging not only a local lawyer, but a lawyer in the distant state; presenting his case in the distant state; not have the benefit of live testimony from the doctors who treated him locally, and hope to come out with a fair and just verdict?

Example (2): "X" Corporation with headquarters in that same distant state sells \$2,000 worth of furniture, or clothing, or merchandise of any kind, to your district leader and on delivery he finds it to be not what he ordered; would you expect—or be satisfied—that he would have to do the same, and go to the distant state to get his money refunded?

If you are satisfied that that is the way to represent your voters, then I can say no more; if you are not satisfied, then I would hope that you vote against any bill that would try to do away with diversity jurisdiction in the Federal Courts.

Keep in mind: voting against diversity jurisdiction does not eliminate litigation; it merely transfers it to another state and just makes it tougher for the wronged party to gain his just redress.

Very truly yours,

MAX R. ISRAELSON.

(b)

KANSAS TRIAL LAWYERS ASSOCIATION,
Kansas City, Kans., March 8, 1979.

Re: H.R. 2202—Diversity Jurisdiction

Hon. ROBERT W. KASTENMEIER,
House of Representatives,
Washington, D.C.

MY DEAR MR. KASTENMEIER: The Kansas Trial Lawyers Association, an organization of over 700 Kansas lawyers involved in the general practice of law, has, through its Board of Governors, voted unanimously to oppose the abolition of federal diversity jurisdiction. This decision was made last year (1978) and was reaffirmed again this year. This organization carefully weighed the arguments for and against retaining diversity jurisdiction and the decision to oppose any change in the present jurisdiction of the federal courts was based solely upon the conclusion that retaining diversity jurisdiction was in the best interest of the public that we serve. Without hesitancy we feel that the abolition of federal diversity jurisdiction would result in the greatest possible prejudice to the public; particularly in the area of civil litigation involving consumers' rights.

It is clear that the proponents of abolishing diversity jurisdiction cite as their main concern the caseloads in the federal courts, and further, the argument that the most expeditious way to relieve these caseloads is to abolish diversity jurisdiction. Unfortunately, the state courts, to whom the proponents would refer

all diversity cases, are inadequate to effectively implement the present trend to make the courts the instrument of consumers' rights. Access to the federal courts by civil litigants is an essential requirement to obtain adequate redress for civil wrongs in a highly mobile society in which the activities of the business community extend beyond state lines. It is essential, of course, to provide access to the courts in order that all elements of society be held responsible for their conduct. This remedial effect of consumer litigation would be forever lost with the abolition of federal diversity jurisdiction.

When we carefully examine our civil justice system it is clear that the jurisdiction of federal courts must not be disturbed. The ability of an individual consumer to institute litigation that will enforce the responsibility of an out-of-state manufacturer or other defendant to all of society must be preserved. The consequences suffered by the "little people" would be disastrous if diversity jurisdiction were abolished.

For all of these reasons, the Kansas Trial Lawyers Association urges you to use your good office to defeat any attempt to abolish or alter the present federal diversity jurisdiction statutes.

Sincerely yours,

LYNN R. JOHNSON, *President,*
Kansas Trial Lawyers Association.

(c)

CHARLES D. BREITEL,
New York, N.Y., March 12, 1979.

HON. ELIZABETH HOLTZMAN,
Langworth House Office Building,
Washington, D.C.

DEAR CONGRESSWOMAN: I understand that you have received a copy of an article written by Chief Justice Robert J. Sheran of the Supreme Court of Minnesota, which appeared in the Creighton Law Review on the subject of "diversity" jurisdiction. I also understand that proposed "diversity" legislation is before or is about to come before your House.

From my experience as a member of the American Law Institute and as the recently retired Chief Judge of the State of New York, I associate myself as in substantial agreement with the views expressed by Chief Justice Sheran. I would hope that his views and mine might receive your careful and favorable consideration.

I am sending a similar letter to Congressman Fish, and to Senator Moynihan and Senator Javits.

With warm personal regards.

Sincerely,

CHARLES D. BREITEL.

(d)

BRANTON & MENDELSON, INC.,
San Antonio, Tex., March 12, 1979.

HON. ROBERT W. KASTENMEIER,
Member of Congress, House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I am writing this letter to you and each of the members of the House Judiciary Committee to express my opposition to H.R. 2202, a Bill that I understand will totally abolish diversity jurisdiction in federal courts. I have been actively engaged in trial practice for over fifteen years. Although I have represented both plaintiffs and defendants in the trial of civil lawsuits, my primary practice is involved in representing persons who have been injured by the unintentional conduct of others and who seek to be compensated by damages.

We all recognize that federal court dockets are extremely full and federal judges extremely busy. However, I implore you not to close the door of a federal tribunal to individuals who, probably, can receive a truly fair trial only in a federal court. Historically, diversity of citizenship jurisdiction was established to provide access to a competent and impartial tribunal, free from local prejudice or influence, for the determination of controversies between citizens of different states. The Supreme Court recognized this purpose in *Burgess v. Seligman*, 107 U.S. 20 (1833). That purpose and to provide a forum to promote procedural reform and to modernize the law of evidence for state court still recognized today by legal scholars. 1 *Moore's Federal Practice*, ¶0.71 [3.-1, 3.-2] (1972).

Simply stated, the people that you represent need the alternative of being able to have their case tried free from local prejudice by a trial judge who is not

elected and by a jury that is not in some way beholden to the defendant. A couple examples should clarify the point. In one case, a 27-year-old Mexican-American woman was treated in the only hospital that served a predominately Anglo four-county area and was operated on by a physician that had been the family doctor for and had brought into the world a substantial number of the residents of the county in question. As a result of an anesthesia injury, the woman suffered irreversible brain damage and is unable to care for herself, her husband or three children. Her husband lost his job. He was unable to care for her and spend the time necessary commuting to and from work in a major city in another county. They were forced to leave their Texas home and travel to Oklahoma where she was able to receive medical attention. Suit was brought against several rural physicians and the hospital, not in their home county, but rather in the United States District Court for the Western District of Texas in San Antonio. Although jurors will be called from the county of the residence of the defendant doctors and hospital, they will also be called from areas who are unfamiliar with these parties, so that the tragically injured woman and her family can receive a completely fair trial free from local prejudice of suing the only hospital and just about the only doctors around.

Assume a situation where a large corporation, be it nationwide or merely local, is the major industry in a rural community which is the county seat of the predominantly rural county. Whether an individual is injured because of the negligence of an operator of a motor vehicle or as the result of an industrial accident, today the innocent victim may seek to have rights adjudicated and his damages ascertained by an impartial jury in United States District Court far removed from the local prejudices and subtle intimidations that can be found by trying a case against the primary supporter of the economy of a local community. If diversity jurisdiction were abolished, the individual would have to have his rights and damages decided by individuals who may be unable to withstand the pressures from the company that is the prime economic support of the community.

There are many other reasons for maintaining diversity jurisdiction, however, these two should be compelling enough reasons to cause you to keep open the doors of the federal court house to the average citizen you represent because in the real world there are local prejudices and factors true today as they were in 1833 that cry out for the need to maintain federal diversity jurisdiction. Your constituents deserve the choice. Thank you for your consideration.

Sincerely yours,

LES MENDELSON.

(e)

NINE & MAISTER,
Bloomfield Hills, Mich., January 11, 1979.

Hon. JAMES BLANCHARD,
U.S. House of Representatives, Washington, D.C.

DEAR JIM: Enclosed is a letter which I have sent to Senator Levin. If you find this suggestion of interest, perhaps you could get some discussion started about it in the House of Representatives.

Best wishes for continued success in the new year. By the way, I have recently moved into Troy, and I am again officially one of your constituents. My new address is: 1580 Brentwood, Troy, Michigan 48098.

Very truly yours,

CARL J. MARLINGA.

NINE & MAISTER,
Bloomfield Hills, Mich., January 10, 1979.

Senator CARL LEVIN,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR LEVIN: As a New Year's resolution, I have decided to finally write my representatives in Washington to suggest some changes in the judicial code. The most significant change that I would like to suggest is the elimination of diversity of citizenship as between citizens of different states as a grounds for federal court jurisdiction. The section I refer to is 28 USC 1332(a)(1).

Congestion in federal courts is a clearly recognized problem across the United States. A great many cases that are filed in the federal courts are based on diversity of citizenship. All of these suits could, of course, be just as easily filed in state courts without any detriment whatsoever to the litigants. The same minimum contacts tests for jurisdiction apply to both federal and state courts. The

service of process requirements are the same. Further, under the *Erie v. Tompkins* decision in 1938 (304 U.S. 64), federal courts sitting in diversity cases must apply state law to determine the issues. It makes little sense to me to have a federal court take jurisdiction of a case only to decide what a state court would do in its place.

The original reason for diversity of citizenship was, as we all know, a desire by the Congress in the early days of the country to provide a more objective forum for a citizen of one state bringing a matter to court in another state. I do not think that that reason continues to have any validity in our shrinking world today. Also, it must be remembered that when diversity of citizenship was first suggested as a grounds for federal jurisdiction, there was a notion that there would be a federal common law which would apply in federal courts which would be different than the state laws in which the federal court was located. With *Erie v. Tompkins*, however, this rationale was extinguished.

I realize that diversity of citizenship as a grounds for federal jurisdiction under 28 USC 1332 is one of the oldest sections of the United States Judicial Code. Because it is old does not mean that it is immutable. I think there is clearly a pressing demand to clear up congestion in federal courts. I think that elimination of this now useless grounds for federal court jurisdiction would be helpful in eliminating this congestion.

Best wishes to you and your family, and I hope that you like the new job.

Very truly yours,

CARL J. MARLINGA.

(f)

BEAUMONT, TEX., March 20, 1979.

Re H.R. 2202.

ROBERT W. KASTENMEIER,

Chairman, House Judiciary Committee, House of Representatives Building, Washington, D.C.

DEAR MR. KASTENMEIER: This letter is written to voice my opposition to H.R. 2202, which I understand to be a Bill to totally abolish diversity jurisdiction. I feel that the diversity jurisdiction criteria in federal cases is one which has worked reasonably well over the last two hundred or more years and while some modification of it may be in order, I feel that it would be a mistake to totally abolish diversity jurisdiction.

I feel further that some sort of diversity jurisdiction is a good and necessary prerequisite for Federal Court litigation and is useful in the protection of rights of claims involving citizens of different states. I feel that the committee should move slowly in approving any type of Bill which would totally abolish diversity jurisdiction.

I am an attorney in Texas, having practiced law some twelve years, and have never written a letter to the House Judiciary Committee before this date.

Thank you for whatever consideration you may give my ideas and comments.

Sincerely yours,

DONALD L. BOUDREAUX.

(g)

BOARD OF COMMISSIONERS,

IDAHO STATE BAR,

Boise, Idaho, March 22, 1979.

HON. ROBERT W. KASTENMEIER,

Chairman of the House of Representatives Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR REP. KASTENMEIER: Enclosed you will find a copy of a Resolution passed by the Board of Commissioners of the Idaho State Bar dealing with H.R. 2202 concerning the abolition of Diversity of Citizenship Jurisdiction of the Federal Courts.

If you have any questions, please feel free to contact me.

Very truly yours,

SAM F. SEEVER.

Enclosure.

RESOLUTION OF THE BOARD OF COMMISSIONERS OF THE IDAHO STATE BAR

Whereas, H.R. 2202 is currently under consideration in the Congress of the United States; and

Whereas, H.R. 2202 would abolish the diversity of citizenship jurisdiction of the Federal Courts; and

Whereas, diversity of citizenship jurisdiction has served as a protection from possible state court prejudice against out-of-state litigants for nearly two centuries; and

Whereas, the possibility of such prejudice is still valid today; and

Whereas, the stated purpose of H.R. 2202 is to remove the delay and backlogs now present in the Federal Courts; and

Whereas, the recent creation of 152 new federal judgeships, the drastic revisions in the new bankruptcy law and the consideration of expanded magistrates' jurisdiction and arbitration legislation may have a drastic impact in reducing delay and backlogs in Federal Courts, and

Whereas, no meaningful statistics have been introduced to reflect the impact of H.R. 2202 upon delay and backlogs in state courts;

Therefore, be it resolved by the Commissioners of the Idaho State Bar that the Commissioners oppose the passage of H.R. 2202 or any bill totally abolishing Diversity of Citizenship Jurisdiction until the impact of recent legislation on reducing Federal Court delay and backlogs can be assessed and until meaningful statistics are presented concerning the impact of abolition of diversity jurisdiction on delay and backlogs in the state courts.

Be it further resolved that the Executive Director of the Idaho State Bar mail a copy of this resolution, by certified mail, to Representative Robert W. Kastenmeier, Chairman of the House of Representatives Subcommittee on Courts, Civil Liberties and the Administration of Justice, to Senator Edward M. Kennedy, Chairman of the Senate Judiciary Committee and to all members of the Idaho Congressional Delegation.

Passed unanimously this 21st day of March, 1979.

I hereby certify that this is a true and accurate copy of the Resolution passed by the Commissioners of the Idaho State Bar on March 20, 1979.

SAM F. SEEVER,
Executive Director.

(h)

THE STATE OF WISCONSIN,
SUPREME COURT CHAMBERS,
Madison, Wisc., March 23, 1979.

HON. ROBERT W. KASTENMEIER,
House of Representatives, House Office Building,
Washington, D.C.

DEAR BOB: As a member of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, I am informed you will be considering proposed legislation to either abolish or severely limit the diversity jurisdiction of the federal courts. The Conference of Chief Justices of the State Courts has taken a position favoring the passage of this proposed legislation. I am also informed that Chief Justice Robert Sheran of the Supreme Court of Minnesota recently appeared before you and stated the position of the Conference of Chief Justices.

I have consulted all the members of our court and the United States District Judges—the Honorable John Reynolds of the Eastern District and the Honorable James Doyle of the Western District—and without exception these judges and justices favor the passage of the proposed diversity legislation and we respectfully urge that you give favorable consideration to this proposed legislation in the committee and on the house floor.

Sincerely yours,

BRUCE F. BEILFUSS,
Chief Justice.

(i)

PENNSYLVANIA BAR ASSOCIATION,
Harrisburg, Pa., March 29, 1979.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice,
Committee on Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: I understand that H.R. 2202 is now before your Subcommittee on Courts, Civil Liberties and Administration of Justice of the House Judiciary Committee.

The Board of Governors of the Pennsylvania Bar Association at its meeting on February 24, 1978 adopted the following resolution in opposition to such legislation:

Resolved, That the Pennsylvania Bar Association opposes proposed legislation eliminating or further restricting the diversity jurisdiction of the federal courts.

We feel that out-of-state parties still need federal courts to escape local bias in many cases. The local discrimination against outsiders which was the original reason for diversity jurisdiction is still an important factor. Also with the new additional judges for the federal courts, it appears they can better handle this problem than the overloaded state courts.

I would appreciate it if you would support the Bar Association's opposition to the legislation.

Very truly yours,

LOUIS J. GOFFMAN.

(j)

APRIL 23, 1979.

HON. ROBERT W. KASTENMEIER,

*Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice,
U.S. House of Representatives, Washington, D.C.*

DEAR REPRESENTATIVE KASTENMEIER: We, the undersigned civil rights, consumer, environmental and citizen groups, commend you for your leadership on issues of access to justice and your interest in a support for reforms which will result in a federal judiciary responsive to the needs of American citizens. We urge you to continue to lead the Congress in reopening the courthouse doors to citizens who seek to vindicate important constitutional and statutory rights.

The most difficult barriers to citizen access to justice are posed by unnecessary technical barriers, procedural delay and prohibitive costs. Restrictive rulings by the Supreme Court on standing to sue, attorneys fees, class action prerequisites and abstention all deny access to justice more effectively and more seriously than crowded court dockets. A sheriff might try to bar citizens from entering the courthouse to present their grievances, but the public outcry would generate nation-wide headlines. Quietly, the Supreme Court has accomplished the same thing for many litigants with important federal claims. Federal court decisions in last decade have made it impossible for indigents to challenge a tax regulation that denied them medical care; impossible for a citizen to challenge allegedly illegal government secrecy; impossible for the Attorney General to assert the constitutional rights of institutionalized mental patients; impossible for consumers cheated out of billions of dollars to recover damages from those who defrauded them; impossible for citizens to use the Federal courts to assert constitutional claims against state officials acting under color of law.

We have heard the arguments that the Federal courts are overworked and that these decisions are a response to the problem of crowded dockets. We believe that this is the wrong response. As Justice Brennan has observed, "a solution [to the problem of crowded courts] that shuts the courthouse door in the face of a litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool, but also a dangerous tool for solving the problem." 90 Harv. L.Rev. 489, 798. Fundamental rights cannot be sacrificed in the name of efficiency.

The measures that the Administration has proposed to increase access to justice focus primarily on streamlining judicial machinery. We agree with the Administration that the problem of delay in obtaining justice in federal courts cries out for a solution. Therefore we support legislation which would eliminate diversity jurisdiction in appropriate cases. Eliminating diversity would remove essentially state matters from the federal courts. Other legislative proposals to reduce the federal court workload should be examined, including expansion of the jurisdiction of magistrates and the provision of options for informal dispute resolution.

However, praiseworthy these reforms are, they do not address the central problem: citizens with federal claims are denied access to justice. Accordingly, we believe that Congress must reinstate the mandate of the federal courts to enforce and protect constitutional and civil rights. The federal court is a forum with unique advantages for the resolution of disputes involving powerless persons and controversial issues. It is a forum designed to withstand political and social pressures.

Effective access to the federal courts calls for Congressional action which eliminates unnecessary procedural barriers posed by restrictive Supreme Court decisions on standing, abstention and class actions. Through arbitrary use of these doctrines the Court has not only destroyed faith and confidence in the federal judiciary but has developed precedents that are thoroughly confusing to courts and litigants alike. The result is a senseless waste of judicial resources which now are expended on threshold issues rather than on the merits. In this regard, the "standing" legislation, S. 680, introduced by Senators Metzenbaum, Kennedy and Ribicoff, and H.R. 1047 sponsored by Representatives Kastenmeier, Harris and Railsback, should be a high priority for the Judiciary Committee. Likewise, legislation to eliminate amount-in-controversy jurisdictional requirements, should be considered favorably and enacted.

Finally, as a practical matter, effective citizen access to the courts requires access to attorneys. Remedial legislation must enable citizens to recover reasonable attorneys fees when they prevail in cases that advance significant public policies. Similarly, measures to reimburse citizens who participate in regulatory proceedings will insure that the regulators consider all relevant points of view. We support the provisions of S. 262 for public participation funding. We urge enactment of legislation that provides for the reimbursement of participation expenses.

Only by paring nonessential cases from the federal docket while granting access to citizens who seek to vindicate fundamental rights, can Congress truly reform the federal judiciary. The need for access to justice demands that this challenge be met.

We hope that this review of court reform issues will be useful to you in setting the congressional agenda in this important legislative area. Your leadership in strengthening access to justice is to be highly commended.

Sincerely,

JOHN H. F. SHATTUCK,

American Civil Liberties Union,

HERB SEMMEL,¹

Center for Law and Social Policy,

NOLAN BOWIE,

Citizens Communication Center,

MARK GREEN,

Congress Watch,

KATHLEEN F. O'REILLY,

Consumer Federation of America,

VICTORIA LEONARD,

Environmental Action,

WILLIAM NYE,

Environmental Law Institute,

ROGER SCHWARTZ,

Food Research and Action Center.

ROBERT A. MURPHY,¹

Lawyers Committee for Civil Rights under Law,

R. PETER ANDERSON,

Massachusetts Law Reform Institute,

PAUL R. FRIEDMAN,¹

Mental Health Law Project,

BETTYE KEHRER,

National Legal Aid and Defender Association,

BOB BOLGER,

SANDY DEMENT,

National Resource Center for Consumers of Legal Services,

EDWARD C. KING,

National Senior Citizens Law Center,

LAURA MACKLIN,

Neighborhood Legal Services,

GERRY SPANN,

Public Citizen Litigation Group,

JIM COHEN,

Sierra Club Legal Defense Fund.

¹ Signing in individual capacity.

(k)

U.S. DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA,
Philadelphia, Pa., May 25, 1979.

Re: H.R. 2202, 96th Congress.

HON. PETER W. RODINO, Jr.,
Chairman, Judicial Committee,
Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN RODINO: I take the liberty of addressing a limited consideration involved in the above legislation.

I understand that there is considerable opposition to the abolition of diversity jurisdiction from both the Philadelphia Bench and Bar. I suggest that the basis for this opposition cannot be found either in the Constitution or in the traditional underlying justifications for diversity jurisdiction. The opposition to the bill is based solely on the fact that the courts in Philadelphia are crowded, have an unseemly backlog and would be further burdened if the litigation now in this court because of diverse citizenship were returned to the State courts. This reasoning is parochial, short-sighted and totally unjustified.

In the first place, diversity jurisdiction is historically justified because of the notion that an out-of-stater suing an in-stater would get a fairer trial in a federal court than he or she would get in a state court. Never was the justification for it the inability of some state courts to discharge their obligations to their citizens. Diversity cases by their nature involve no federal question. Federal judges sitting on diversity cases must follow state law whether they agree with it or not. They are powerless to make law since their conclusions in diversity cases can be upset by the lowest court of the state in which they sit.

I suggest that diversity jurisdiction was never designed to make the federal courts the dumping grounds for cases that belong in the state courts, but which the state courts are unable or unwilling to handle. Reduced to its lowest terms, the Philadelphia argument is this: Our state courts are too slow and the legislature is unwilling to provide sufficient judicial manpower; therefore the Congress should take up this state burden and Congress should, in effect, provide us with the additional judges we need. I suggest that the mere statement of this proposition reveals its fallacy.

Second, the position of the Philadelphia Bench and Bar loses sight of the fact that this is nation-wide legislation and is not confined to the borders of Philadelphia County, Pennsylvania. It loses sight of the fact that in many districts of the country it is the federal courts which lag far behind the state courts because of the vast increase in federal litigation in the past five or ten years. For example: in Michigan, if a case is started in the state court and the defendant wishes to delay, the case is removed to the district court if there is diverse citizenship. The Southern District of Florida is far behind in its civil docket, as is the Southern District of California, to mention only a few examples.

It seems to me ridiculous to make Philadelphia the determinative factor for the entire country throughout which the abolition of diversity is badly needed.

Over the past several years the litigation which belongs in federal courts, namely federal question litigation, has proliferated and become infinitely more complex. Thus, complicated security cases, class actions, antitrust suits, employment discrimination and civil rights actions, to mention only a few areas, have burgeoned to the point where federal courts are unnecessarily burdened by diversity cases and impeded in the disposition of cases they should by tradition and role decide.

I strongly urge that the myopic arguments advanced by the Philadelphia Bench and Bar be rejected and the legislation enacted.

Sincerely yours,

JOSEPH S. LORD, III.
Chief Justice.

MAGISTRATES REFORM

APPENDIX IV—ADDITIONAL STATEMENTS

(a)

FEDERAL DEFENDERS OF SAN DIEGO, INC.,
San Diego, Calif., March 12, 1979.

Re Magistrate Act of 1979, S. 237.

HON. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties, and Administration of Justice, House of Representatives, Committee on the Judiciary, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: As a federal defender in the Southern District of California which has a substantial criminal caseload that utilizes three full-time and two part-time magistrates as well as Chairman of the Legislative Committee of the Defender Committee of the National Legal Aid and Defender Association, I would like to offer several suggestions on the proposed Magistrate Act of 1979, S. 237, introduced by Senator DeConcini. This legislation will have far-reaching effects on the improved utilization of judicial resources in the handling of civil and criminal cases in the district court, but there are several areas in which the proposed legislation might be improved.

CONSENSUAL TRIAL OF LOW-GRADE FELONIES

The proposed legislation should be modified to permit upon the consent of the parties a magistrate to conduct any and all proceedings in a jury or nonjury criminal case, except a capital case, including judgment and commitment, but with the express proviso that the magistrate could not impose a sentence of confinement in excess of 18 months. Experienced lawyers, whether they be prosecutors or defense lawyers, recognize that many felony charges returned by the grand jury will not result in a sentence in excess of 18 months. These low-grade felonies could be with the consent of both parties tried before the magistrate. This would relieve some of the burden of the district court, but more importantly it would provide an additional option in the utilization of the magistrate resources. The consent would not be unduly obtained, for it would be no different than the present situation in which the defendant exercises the right to trial by jury. Given the dynamics of the district court, this provides an important option that would protect the right to trial by jury at the same time conserving district court resources. If this alternative procedure to the district court jury trial is selected, then the need for review by the district court would be unnecessary, and the proposal should provide for a direct appeal to the court of appeals like any other criminal felony conviction. This procedure is especially important in federal practice where there is only rare use of preliminary hearings that permit case assessment.

MAXIMUM LIMITATION ON SENTENCES OF CONFINEMENT

A magistrate may hear several petty offenses arising out of the same action. Federal law permits wide use of consecutive sentences, and if a defendant was convicted of five petty offenses a magistrate might be able to impose a sentence of three years confinement. In federal practice, a commitment in excess of six months will usually mean that the prisoner is removed from the community and transferred to one of the various satellite federal prison facilities. If a sentence of 18 months is going to be imposed in any case, it should be by a district court judge whether it is a felony offense or an accumulation of petty or misdemeanor offenses.

CONSENSUAL JURISDICTION

The proposed amendments to 18 U.S.C. 3401 should preserve the right of the defendant to be heard before a district court judge in a petty or misdemeanor offense. The term "heard" is used rather than "tried" which is in the existing legislation because the election is often made just to enter a plea of guilty and be sentenced by a district court judge.

Although the proposed legislation makes a change so that the defendant charged with a petty offense must demand a trial, I would urge that formal written consent be obtained from any defendant, even a person charged with a petty offense, if they might be subject to confinement. This is the standard used to determine the need for appointed counsel under *Argersinger v. Hamlin*, 407 U.S. 75 (1972). If the person faces confinement from the magistrate, it would be wise to have the express consent. In the overwhelming bulk of petty offenses, traffic offenses on military enclaves, there would not be much expectation of imprisonment and the demand procedure might be appropriate. Further, the right to be heard before a judge of the district court should also include a provision "or a different magistrate with the consent of the defendant." In many instances, the refusal to consent to force the case into the district court arises out of reluctance to have the case heard before a particular magistrate, and this might be alleviated by providing the random assignment to a different magistrate so as to relieve the load of the district court for a petty or minor misdemeanor offense. This suggestion follows the principle of subsidiarity which is designed to dispose of the case at the lowest level possible consistent with the interests of justice and that of both parties.

PROSECUTORIAL REFERENCE TO THE DISTRICT COURT

Proposed subsection (f) of 18 U.S.C. 3401 is inappropriate, for the prosecutor with his or her unfettered charging power could easily classify the offense initially as a felony so as to require disposition in the district court. This provision has the potential for severe abuse, for once the prosecution has characterized the criminal wrongdoing as a misdemeanor, the selection of the case to go to the district court might arise out of the fact that the defendant wished to contest the matter before the magistrate (now permitted with a jury trial). Also, the prosecutor's generation of cases gives great calendar manipulation, and this device smacks of unfairness because of the danger of the prosecutorial selection forcing a particular misdemeanant defendant to the district court.

HEARINGS ON MOTIONS TO SUPPRESS EVIDENCE

Clarification is necessary on the function of district court review of a hearing of a motion to suppress evidence conducted by a magistrate. The cases are uncertain as to when there should be de novo review by the district courts. The motion to suppress hearing which involves an important fact-finding process that may be dispositive of the criminal case should be heard before the magistrate with the consent of the defendant. If the government loses this motion, it has a pretrial appeal (18 U.S.C. 3731), but the defendant does not. *DiBella v. United States*, 369 U.S. 121 (1962). The decision should be treated as made by a district court judge with the appellate remedy to the court of appeals, not the district court. Since many criminal cases, especially those involving controlled substances, involve suppression of evidence or statements, the clarification by statute would encourage greater use of the magistrates.

MAGISTRATES AS JUDGES

The characterization of these important judges as "magistrates" is unfortunate. If the volume of federal district court business was evaluated, the magistrates handle the overwhelming bulk. They are judges, and they should be called judges. Bankruptcy judges are appointed by the district court in the same fashion as magistrates, and the magistrates should not be differentiated from these other specialized judicial officers. In 1968 Congress transformed the "commissioner" into a "magistrate" because of the expanded jurisdiction in assuming many duties that would otherwise be handled by a district judge. Then a magistrate earned \$22,500 a year, but today a magistrate may earn twice that sum. Those with ten years law practice earn approximately \$6,000 less than that

provided for a district court judge. The duties of the magistrate under the proposed legislation will be made comparable with the municipal court judge in California (salary approximately \$49,000).

Within the various federal district court communities there is not the same homogeneous and essential rapport between the two levels of judiciary as found on the state bench between municipal and superior court judges. To achieve more efficient and harmonious utilization of these valuable judicial resources, the title of magistrate which serves as a barrier should be eliminated.

The suggestion that the magistrates be treated as associate judges is not without precedent, for in Illinois the junior judicial officer was at one time called a magistrate. Later the term "associate judge" was applied. This ambiguity which causes continuous concern as to whether a magistrate is a real judge is unhealthy. The proposed legislation encourages the merit selection of magistrates, increases their responsibilities, and permits them to conduct jury trials. They would now serve as an integral part of the local federal judiciary, and this judicial office should be recognized with the correct appellation of judge. The increased respect will attract well qualified candidates to serve in the exercise of these substantially increased judicial responsibilities.

This week the Senate may take action on this proposed legislation, but I hope the House will carefully evaluate its potential impact on the practice in federal courts. This legislation is designed to achieve better utilization of federal judicial resources, a meritorious goal. The proposed amendments, in my opinion, are directed to achieve that goal but also ensure that the person appearing before the magistrate has a meaningful and non-coerced option to seek to have his case heard before a district judge.

Sincerely,

JOHN J. CLEARY,
Executive Director.

(b)

REPORT OF THE AD HOC COMMITTEE TO STUDY THE HIGH COST OF LITIGATION TO
THE SEVENTH CIRCUIT JUDICIAL COMMITTEE AND THE BAR ASSOCIATION OF THE
SEVENTH CIRCUIT

MAY 7, 1979.

MEMBERS OF THE AD HOC COMMITTEE TO STUDY THE HIGH COST OF LITIGATION

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* * * * *

CONSIDERATIONS FOR EFFECTIVE USE OF MAGISTRATES

Although all districts in the circuit are burdened by heavy caseloads, it must be recognized that case processing problems, and therefore the needs of the various districts, differ. Relevant factors in the design of a program to use magistrates most effectively to meet those needs include: (1) the size of the district; (2) the number of judges and magistrates and the ratio between them; (3) whether there is a high volume of filings in the district; and (4) the relative competency of the magistrates. The development of local rules prescribing a system of referral of cases to magistrates should be begun only after a careful consideration of these factors.

It should be emphasized that unanimity among judges as to implementation of a referral system is an important ingredient in the efficiency and success of the system. Counsel are understandably perplexed by the practice of some judges who severely restrict magistrates' jurisdiction while other judges delegate maximum jurisdiction. Some judges, it is true, are hesitant to delegate maximum jurisdiction to magistrates whose ability or competence they question. As a result, the only solution to the problem appears to be for the bench and bar to cooperate to the fullest extent to insure that vacancies in magistrate positions are filled with persons with the greatest ability and competence.

It would seem that the larger the district, the greater the need for a clearly defined referral system. For example, in a district where there is one magistrate and one or two judges, an informal system of referral may be adequate. On the other hand, in a large district where several magistrates serve many judges, a more formal system is generally needed. Basically, there are five types of referral systems which could be implemented. The relative advantages and disadvantages of each are discussed below.

(A) ASSIGNMENT OF MAGISTRATE TO PARTICULAR JUDGE(S)

Magistrates could be assigned to assist a particular judge or judges. An advantage of such an assignment system is that the magistrate may be able to develop a close working relationship with the judges to whom he is assigned, to the extent that the magistrate becomes the "alter ego" of the judges. Some commentators feel that multi-judge courts using this system may find that (1) the magistrate's lack of contact with the other judges results in a concomitant narrowing of the magistrate's experience and perspective, and (2) magistrates are overused or underused by the judges to whom they are assigned. However, these two considerations do not appear to weigh heavily against the system's use.

For optimum results under the "alter ego" approach, it seems that the proper ratio is one magistrate per judge. However, the committee suggests that in a multi-judge high-volume court, a relatively efficient and workable ratio may be one magistrate per two judges.

(D) REFERRAL OF SPECIFIC CATEGORIES OF CASES TO ALL MAGISTRATES ON A RANDOM BASIS

Specific categories of cases could be randomly assigned to magistrates by the clerk of the court when the cases are filed. Advantages of case assignment include: (1) the judges do not have to spend time deciding which cases to refer to a magistrate; (2) each judge obtains approximately the same assistance from the magistrates; and (3) the magistrates develop expertise in handling particular categories of cases referred to them. The chief disadvantage is lack of uniformity in areas of law where magistrates differ. Although some differences between the various judges in each district are common when the case law is not clearly defined, a problem occurs when a judge adopts one magistrate's report and recommendation in a particular case and then several months later adopts the report of another magistrate that is based on a different interpretation of the law. The result is inconsistency in the judge's rulings and the judge may not be aware of the inconsistency even though he exercises due diligence in reading the reports and recommendations.

(C) SPECIALIZATION BY INDIVIDUAL MAGISTRATES

Each magistrate could specialize in particular categories of cases. The advantages of specialization are: (1) each magistrate becomes a specialist and develops expertise in particular areas of the law; (2) judges do not spend time deciding

which cases to refer to magistrates; (3) the possibility for inconsistency is eliminated; and (4) each magistrate helps all judges equally. The disadvantages include: (1) one magistrate might be handling a more difficult or voluminous category and the work may not be distributed equally; (2) the work may become uninteresting and routine for the magistrate; and (3) the field of law in the district may become narrowed because of single-magistrate review.

(D) CASE-BY-CASE REFERRAL BY DISTRICT JUDGE

The case-by-case system may be the most useful in a small district where there is just one magistrate and one or two judges. However, in a large district the disadvantages are that: (1) some judges may refer both a greater volume of, and more complicated, cases than other judges; (2) judges may find themselves competing against one another for use of magistrates; (3) magistrates may compete among themselves for assignments from particular judges; (4) where extensive proceedings have occurred before the judge, attorneys may sometimes take the position before the magistrate that the judge previously decided the issue, resulting in a considerable waste of the magistrate's time reviewing the earlier proceedings to confirm the existence of the ruling; and (5) confusion is easily created when the referral order does not reach the magistrate or when the judge overlooks the referral to the magistrate and enters an order in the case.

(E) COMBINATION OF SYSTEMS

Combinations of the systems discussed above may be used to achieve specialization and efficiency (assigned categories) with flexibility and diversity (case by case references).

The authority of magistrates has been statutorily expanded and will likely be expanded even further in months to come. In view of this fact and the fact that the cost of establishing a magistrate position with staff and continuing it from year to year is less than half the cost of establishing and continuing a judge position with staff, we believe that expanded and effective use of magistrates will significantly speed cases to disposition and therefore cause a reduction in costs to the litigants and the system in general.

The committee recommends:

(1) that the bench and bar cooperate to the fullest extent possible to ensure that only the highest qualified individuals are appointed to fill United States magistrates positions in this circuit as such positions are created or as vacancies occur;

(2) that magistrates be used to the fullest extent possible under existing law with their functions tailored to the needs of the individual districts;

(3) that each district establish or update local rules clearly defining its system of referral of cases to magistrates, after the limits of magistrates' authority is ultimately defined by Congress in coming months. Factors and considerations discussed in this report might provide a starting point for development of such rules;

(4) that consideration be given to providing magistrates with adequate physical facilities to handle their current duties plus their augmented duties as authorized under the anticipated magistrate legislation;

(5) that consideration be given to providing magistrates with legal research assistance;

(6) that consideration be given to providing magistrates with combination of court reporters and multi-track electronic recording equipment with efficient transcribing capabilities.

* * * * *

APPENDIX V—SUPPLEMENTAL MATERIALS SUBMITTED BY WITNESSES

(a) By Honorable Daniel J. Meador

(1) TRIAL BY FEDERAL MAGISTRATE: A CONSTITUTIONAL ANALYSIS

Although U.S. magistrates are important judicial officers of the district courts, appointed by and serving under the supervision of the courts, magistrates are not fully-fledged judges appointed under Article III of the Constitution and enjoying its protections of lifetime tenure during good behaviour and irreducible salary while in office. For these reasons, and because the judicial power of the United States is "vested" in the Supreme Court and in the lower courts which Congress has established under Article III, proposals to permit civil and criminal trials before magistrates are sometimes met with the objection that to do so would be in violation of the Constitution.

This memorandum examines the ground for such objections and concludes that they are ill-founded with respect to trials before magistrates appointed by the district courts, specially designated to exercise their jurisdiction in particular trials or in named classes of cases, where the procedural protections required by due process are maintained, and where a right of appellate review by an Article III judge is guaranteed. Because these features are present both in the current language of the Federal Magistrates Act and in proposals for expanding the trial powers of those magistrates, the memorandum concludes that there are no supportable constitutional grounds for objection or challenge to a trial conducted before a federal magistrate.

I—FEDERAL MAGISTRATES

United States Magistrates are officers of the district courts, not judges of some inferior or "legislative" court. They are appointed by the Article III judges of the court¹ and are at all times subject to their direction and control.² Successor to the U.S. commissioners system, the magistracy was created in 1968, and its powers somewhat expanded and clarified by amendment in 1976.³ Congress, in enacting the Federal Magistrates Act, was at pains to note that the jurisdiction exercised by the magistrate is the jurisdiction of the court itself, and is not grounded on any treatment of the magistracy as a separate system of junior trial courts.⁴ When a magistrate acts, it is by authority of the district court, through its jurisdiction, and—in trial-type decisions—after special designation by order of the court itself.

Magistrates are appointed for a term of years rather than for life, the length of the term depending upon whether the appointment is full or part-time.⁵ They have all the powers formerly exercised by U.S. commissioners,⁶ may administer oaths and affirmations,⁷ and may try minor crimes and offenses when specially designated to do so by a judge of the court and when the defendant consents.⁸

¹ 28 U.S.C. § 631(a). The term "Article III judge" will be used to describe a judicial officer of the United States who is a judge or justice of a court organized under Article III of the Constitution, and who enjoys the protections of tenure during good behaviour and irreducible salary while in office, in contrast to judges of courts which are not organized under that Article.

² 28 U.S.C. § 631(h), 636(b).

³ Pub. L. 94-577, 90 Stat. 2729.

⁴ S. Rept. No. 371, 90th Congress, 2d Session, at 31.

⁵ 28 U.S.C. § 631(e).

⁶ 28 U.S.C. § 636(a)(1).

⁷ 28 U.S.C. § 636(a)(2).

⁸ 28 U.S.C. § 636(a)(3).

As to the exercise of these powers by magistrates there is not much dispute, although one commentator suggests that criminal trials by magistrates—even with the consent of defendants—“encroach” upon the judicial power and are without the Constitution. See note, *The Validity of United States Magistrates’ Criminal Jurisdiction*, 60 Va. L. Rev. 697 (1974).

In addition to these powers, the district court may specially designate magistrates within its territorial jurisdiction to perform “such additional duties as are not inconsistent with the Constitution and laws of the United States,” 28 U.S.C. § 636(b) (3), 90 Stat. 2729. Examples of magisterial duties specifically approved in the amended Act are: hearing and determining any pretrial matters pending before the district court, with 8 named exceptions for case-dispositive motions; hearing and recommending decision to the district court on the 8 exceptional matters; and hearing and recommending disposition of petitions for post-trial relief and prisoner petitions challenging the conditions of imprisonment. See § 636(b) (1) (A), (B). Where a magistrate has heard and determined a matter, that decision is final and may be reconsidered only where the magistrate’s action is “clearly erroneous or contrary to law.”⁹ Where the magistrate acts only to recommend decision to the judge, the court may review the entire matter *de novo* in its discretion, or may recommit it to the magistrate for further proceedings.¹⁰ Magistrates’ trial actions are subject to orders of the district court in making the designation for trial, and may be further regulated by rules of the court respecting procedures and the kinds of cases or controversies which may be referred to a magistrate within each district.

II—CONSTITUTIONAL OBJECTIONS

Section 1 of Article III of the Constitution provides that the judicial power of the United States—

shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

The second sentence of Section 1, immediately following, requires that judges of these “Article III” courts shall hold office during good behaviour, and that their salaries may not be diminished while in office. The various objections raised concerning trial before federal magistrates revolve around the grant of judicial power in Section 1 and its relationship to the judicial officers whom Congress may require or permit to decide cases or controversies falling within the power itself.

There seem to be two chief grounds of concern. One is that trial by magistrate is simply inconsistent with the constitutional vesting of judicial power in courts with judges who enjoy life tenure. The second is that trial by magistrate would deny litigants some right to an essential element of justice, guaranteed by the terms of Article III or another part of the Constitution.

Objection on the first ground implies either that the judicial power of the United States may not be exercised by persons other than Article III judges, or that its use by non-tenured magistrates appointed by those judges is—nonetheless—incompatible with the courts’ constitutional role. Objection on the second ground rests on the view that litigants either have a fundamental right to trial before an Article III judge whenever their case of controversy enters the federal judicial system, or that trial before a magistrate would deny to them some other element of the due process of law. Thus while the first set of objections are concerned with the nature of the judicial system itself, the second arise from the personal rights of litigants and criminal defendants within the federal judicial system.

1. MAY THE JUDICIAL POWER OF THE UNITED STATES BE EXERCISED BY PERSONS OTHER THAN JUDGES OF COURTS CREATED UNDER ARTICLE III OF THE CONSTITUTION?

The answer is clearly that it may: Article III has never been viewed as an exclusive grant of power to judges of Article III courts. From the time of the Constitutional Convention onward, officers and tribunals organized under other authorities have had the power to decide questions within the judicial power of the United States. For example, it is generally accepted that members of the

⁹ 28 U.S.C. § 636(b) (1).

¹⁰ 28 U.S.C. § 636(b).

Convention expected most questions within that power to be decided in the first instance by State courts. Records of the Convention contain numerous indications that it was expected that the Congress would in the beginning go no further than to vest an admiralty jurisdiction in inferior federal courts. See generally, Farrand, *The Framing of the Constitution*, 68-123 (1913) ; 2 Farrand, *The Records of the Federal Convention*, 45-56 (1911) ; Warren, *The Making of the Constitution*, 539-41 (1937 ed.).

The States have exercised a major portion of the judicial power ever since. The First Judiciary Act (1 Stat. 73) repudiates the view that Article III requires the entire judicial power to be vested in the federal courts, leaving both federal-question and federal criminal enforcement jurisdiction in the State courts until 1875. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923) ; Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925). Since that time Congress has empowered a variety of tribunals to decide cases and controversies which would otherwise be cognizable in an Article III court, even though members of those tribunals are not accorded life tenure under Article III. Examples are: Administrative agencies,¹¹ State courts,¹² territorial courts,¹³ courts in unincorporated territories,¹⁴ Indian courts on tribal membership questions related to federal treaty,¹⁵ Consular Courts established by foreign concessions,¹⁶ military courts-martial and the Court of Military Appeals,¹⁷ courts to determine private land claims under treaties and foreign grants,¹⁸ and the Tax Court, established first as an independent agency within the executive branch and now denominated a "legislative court" established under Congress's Article I powers.¹⁹

In *Palmore v. United States*, 411 U.S. 389 (1973), a criminal defendant convicted in a non-Article III court of the District of Columbia argued that any trial involving an exercise of the judicial power of the United States must be tried by an Article III judge. The Court saw the claim as one which—

ultimately rests on the proposition that an Art. III judge must preside over every proceeding in which a charge, claim, or defense is based on an Act of Congress or a law made under its authority. *Id.*, at 400.

After canvassing the history of many of the cases just cited, the Court concluded that—

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. *Id.*, at 407.

This issue is settled: Congress is not constitutionally required to provide that every federal question falling within the judicial power of the United States must be decided in an Article III court.

2. MAY THE JUDICIAL POWER OF THE UNITED STATES BE EXERCISED BY NON-TENURED OFFICERS OF AN ARTICLE III COURT?

Again, the answer is clearly "yes". Delegation of judicial power to non-article III officers of Article III courts is well-established, and may extend to the whole or part of a case. The practice is of equal antiquity to the organization of the federal courts themselves. In *Thornton v. Carson*, 7 Cranch 596, Chief Justice Marshall approved the Circuit Court's action in referring two pending cases to arbitrators under rule of court, giving effect to the arbitrators' awards. In *York and Cumberland R.R. Co. v. Myers*, 18 Howard 246, the Court refused to entertain objections claiming lack of jurisdiction in a panel of three arbitrators appointed by a Circuit Court with consent of the parties; instead, the Court proceeded to decide the other questions presented on their merits. Likewise, in *Alexandria Canal Co. v. Swan*, 5 Howard 89, the Supreme Court found that a trial by arbitrators appointed by the court was one of the modes of prosecuting

¹¹ *Crowell v. Benson*, 285 U.S. 22 (1932).

¹² *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304.

¹³ *American Insurance Co. v. Canter*, 1 Pet. 511 (1828).

¹⁴ *Downes v. Bidwell*, 182 U.S. 244, 266-7.

¹⁵ *Stephens v. Cherokee Nation*, 174 U.S. 445.

¹⁶ *In Re Ross*, 140 U.S. 453.

¹⁷ *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969).

¹⁸ *United States v. Cox*, 155 U.S. 76.

¹⁹ See 26 U.S.C. §§ 7441 et seq.

a suit to final judgment as well-established and as fully warranted by law as a trial by jury.

Mr. Justice Clifford, in *Heckers v. Fowler*, 2 Wall. 123 (1864) found the practice of referring pending actions under a rule of court to arbitrators and referees appointed by the court to be a mode of prosecuting suits to judgment as well established and as fully warranted as trial by jury, see *id.*, at 128-131. Writing for the Court, he stated that

Circuit Courts, as well as all other Federal courts, have authority to make and establish all necessary rules for the orderly conduct [of] business in the said courts, provided such rules are not repugnant to the laws of the United States. *Id.*, at 128.

Trial by inferior judicial officers such as arbitrators and referees was, he wrote, "well known at common law" and the use of referees' reports as the basis for final judgment "universally regarded" as proper, *id.*, at 131.

The practice was not abandoned in later years. In *Ex Parte Peterson*, 253 U.S. 300, 312 (1920) Justice Brandeis expressed the Court's continuing views that the use of untenured judicial officers was within the constitutional power of federal courts:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a case.

Examples of the use of nonjudges in case-dispositive positions are widespread throughout the federal judicial system: Referees in bankruptcy can exercise all the powers of the bankruptcy court (itself the United States district court for that district) except those specifically denied him in the Bankruptcy Act. *In re Swartz*, 130 F.2d 29 (7th Cir., 1942), such as enjoining another court, 11 U.S.C. § 11(a) (15), holding a party in contempt, 11 U.S.C. § 69(b), or appointing receivers, 11 U.S.C. § 517. Yet the referee is not a separate court: he has no independent judicial authority. He is "merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference. . . ." *Weidhorn v. Levy*, 253 U.S. 268, 271 (1920). Other examples are Commissioners of the Court of Claims (itself an Article III court) (Ct. Cl. R. 52(a), (b)); U.S. commissioners (predecessors of magistrates) exercising trial powers, *Rice v. Ames*, 18 U.S.C. 371 (1901); and special masters appointed under F.R. Civ. Procedure 53(b).

Some courts have analogized from the limits placed on the use of special masters under Rule 53(b) to the role of magistrates,²⁰ an analogy which the Supreme Court last year rejected in *Mathews v. Weber*,²¹ where the court distinguished the statutory powers of magistrates from the special restrictions which the Rules place on use of special masters. *Id.*, at 273. The court had earlier determined that the practical need to reduce delays in litigation counseled against use of special masters except in "exceptional circumstances", *Los Angeles Brush Mfg. Co. v. James*,²² and had indicated that it would strictly adhere to that standard for masters. *La Buy v. Howes Leather Co.*²³ *Weber* makes it evident that the *La Buy* standard is not applicable when magistrates are used in their statutory role under 28 U.S.C. § 636(b).

It is therefore well-established both that non-article III officers of Article III courts may exercise the judicial power, and that magistrates acting under statutory authority and with the jurisdiction of the district courts which appoint them are not subject to the restrictions of Rule 53(b) of the Federal Rules of Civil Procedure; that is, their role is not confined to "exceptional circumstances" under that rule.

3. WOULD TRIAL OF CIVIL CASES BY MAGISTRATES DIVEST THE DISTRICT COURT OF ITS JURISDICTION, IN VIOLATION OF ARTICLE III?

Congress has plenary authority over the jurisdiction of the inferior courts which it ordains and establishes. It seems a necessary inference from the express decision at the Constitutional Convention to give Congress the power to create

²⁰ See, e.g., *Ingram v. Richardson*, 471 F. 2d 1268 (6th Cir. 1972) in which the court concluded that court congestion was not an "exceptional circumstance" warranting use of magistrates as special masters. The Circuit Court also implied that litigants are entitled to case determination by Article III judges, *id.*, at 1271 & n. 2.

²¹ 423 U.S. 261 (1976).

²² 272 U.S. 701 (1927).

²³ 352 U.S. 249 (1957).

inferior federal courts that the scope of the jurisdiction of such courts, once created, was also to be determined by Congress. See e.g., Hart & Wechsler's *The Federal Courts and the Federal System*, 4-13; *Glidden v. Zdanok*, 370 U.S. 530 (1962).

The great constitutional compromise that resulted in agreement upon Art. III, § 1 authorized but did not obligate Congress to create inferior federal courts. . . . Once created, they passed almost a century without exercising any very significant jurisdiction. . . . Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment. . . . *Id.*, 551 (citations omitted).

The Supreme Court has expressly recognized the power of Congress respecting jurisdiction of the federal courts on repeated occasions. Two of the most prominent are *Sheldon v. Sill*,²⁴ and *Ex Parte McCordle*.²⁵ In the earlier case the court held that, except with respect to the original jurisdiction of the Supreme Court, the disposal of judicial power "belongs to Congress: and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant." In *Ex Parte McCordle*, where the issue was not denial of jurisdiction but its withdrawal while a petition for habeas corpus was pending in the Supreme Court, the Court agreed that its jurisdiction was put at an end, and that without jurisdiction the Court could not proceed at all.

It is clear that Congress might, if it chose, divest the district courts of part or all of their present jurisdiction, or might provide that particular causes of action be adjudicated in the first instance in non-Article III tribunals, see section 1, *supra*. Of course, some provision for ultimate judicial review by an Article III court may be necessary as a basic element of due process in some circumstances.²⁶ Indeed, the Congress may even abolish unneeded Article III courts (although their judges retain the protections of section 1). See, e.g., Act of March 8, 1802, 2 Stat. 132, abolishing the new courts implicated in the federalist court-packing plan of *Marbury v. Madison*, and Act of October 22, 1913, 38 Stat. 208, 219, abolishing the unlamented Commerce Court. In the latter case, the judges were reassigned, to other courts. See also F. Frankfurter & J. Landis, *The Business of the Supreme Court* (1928) 25-32.

But, while the Congress might constitutionally transfer trial jurisdiction from the district courts to other fora, giving trial authority to magistrates would not constitute such a transfer. Magistrates are not a separate "police" court within the federal system; they exercise the jurisdiction of the district court itself, and by its designation and referral. A magistrate (1) may not hear a case unless it is within the jurisdiction of the district court, (2) is appointed by that court as a judicial officer, (3) must be specially designated to try cases, (4) hears only the cases referred by judges of the district courts, (5) is subject to review of right in those courts, and (6) is subject to removal by judges of the court in case of incompetence, neglect of duty, misbehaviour, or disability. These numerous instances of the exercise of judicial discretion by Article III judges with respect to the work of magistrates are inherent elements of any trial before a magistrate, and do not permit a conclusion that such trials oust the district courts of their jurisdiction. No case will appear before a magistrate unless referred by a judge of the court, and no ground has been shown to conclude that those judges will abdicate their judicial responsibilities to magistrates. Cf. *Mathews v. Weber*, 423 U.S. 261, 274 (1976).

4. WOULD TRIAL BY MAGISTRATE BE INCOMPATIBLE WITH THE CONSTITUTIONAL ROLE OF THE DISTRICT COURTS?

No. The protections of Section 1 of Article III do not confer personal benefits on individual judges: instead, it is clear from the debates surrounding adoption of the Constitution that they were intended to protect the judiciary—perceived as the weakest of the three branches of government—from pressures to decide individual cases in a manner not warranted by law. See 1, Farrand, 121; 2 *Id.*, 44-45, 429-30; Warren, *The Making of the Constitution*, 532.

Hamilton found two chief virtues in the protections of life tenure (permanency in office) and irreducible salary; an aid to consistency in decision, through

²⁴ 49 U.S. (8 How.) 411 (1850).

²⁵ 73 U.S. (6 Wall.) 318 (1868).

²⁶ See, e.g., Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 201-02 (1960); Compare, *Yakus v. United States*, 321 U.S. 414 (1944).

accrued experience over years, and a guarantee against removal for "wrong" decisions. See *The Federalist*, No. 78, at 523-4 and 531, No. 79 generally, No. 82. As—

"Nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient . . . and in a great measure as the citadel of the public justice and the public security." No. 78 at 523-4.

Trial before federal magistrates appointed and designated to conduct such trials by federal district courts, of cases referred to them by judges of the courts and subject to their review, can pose no threat to the independence or tenure in office of the court itself.

The only suggestions of such a threat to be found in recent decisions of the Supreme Court are in Mr. Justice Black's comments for the Court in various court-martial cases. For example, in *Toth v. Quarles*,²⁷ he noted that "any expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution, where persons on trial are surrounded with more constitutional safeguards than in military tribunals." Justice Black went on to discuss the virtues of Article III courts, pointing to life tenure and irreducible salary, and noting that the provisions of Article III "were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." His comparison of courts-martial with Article III courts is by way of demonstrating the cumulative procedural deficiencies of military tribunals which—taken together—amount to a lack of due process for civilian dependents in capital cases.

Later cases demonstrate that the true ground of decision in *Toth* was the absence of due process for defendants in court-martial cases, not the nature of the power under which the courts-martial were constituted. Thus, in *Reid v. Covert*,²⁸ Justice Black stressed that military trials for dependents accompanying soldiers overseas would deprive them of rights under section 2 of Article III (jury trial in criminal case) and the Fifth and Sixth Amendments. Later, in *O'Callahan v. Parker*,²⁹ Justice Douglas emphasized the shortcomings of trial by court-martial (pp. 263-65): lack of a jury; no requirement for unanimous finding of guilt; no presiding judge, but a law officer appointed by the commander who brought the charges; different rules of evidence and procedure; and the "pervasive" suggestion of command influence in favor of convictions.

Trial by magistrate shares none of these deficiencies; it does not encroach on the jurisdiction of district courts, for it is conducted as an exercise of their authority, by officers appointed through the court and subject to their review. There is no suggestion of command influence, of altered rules of procedure, of the absence of defense counsel, and no threat to the independence of the court itself. It seems reasonable to conclude, therefore, that the courts-martial cases do not afford a valid ground of attack on the constitutionality of trials before magistrates.

5. WOULD TRIAL BEFORE MAGISTRATES DEPRIVE LITIGANTS OF AN INDIVIDUAL RIGHT GUARANTEED BY THE CONSTITUTION?

The only significant procedural differences between magisterial trials and those conducted before district judges appear to be the character of the presiding officer and the absence of a jury. *Palmore* and the other instances of trial before non-Article III bodies establish that there is no constitutional imperative forbidding trial of judicial questions before non-Article III courts.³⁰ The remaining

²⁷ 350 U.S. 11, 15-17 (1955).

²⁸ 354 U.S. 1 (1957).

²⁹ 395 U.S. 258 (1969).

³⁰ *Palmore*, of course, arose from a trial conducted within the District of Columbia—an enclave under exclusive federal jurisdiction. It might be argued that *Palmore* and similar cases involving territorial courts (*American Ins. Co. v. Canter*, *supra*), military courts-martial (*O'Callahan*, *supra*), and trials before U.S. commissioners in federal enclaves are permissible only because of the special powers which Congress exercises over such enclaves. This argument ignores the many instances (bankruptcy, trial of petty offenses not on federal reservations, referral to arbitrators, administrative determinations, the Tax Court, etc.) where the trial jurisdiction of non-Article III officers is not tied to a purely territorial jurisdiction of the Congress. Moreover, the argument is internally inconsistent: If Article III requires life-tenured judges as a protection against pressure from Congress on the judiciary, the need should take on greater rather than lesser urgency in areas where Congressional power to govern is undiluted by the presence of a State legislature and judiciary. Yet to accept the argument that "legislative courts" such as those in the District of Columbia are permissible only because of the plenary power of Congress in those areas is to say that Congress may further reduce the independence of the judiciary in just those areas where it is most needed.

questions are thus whether the nature of magistrates as presiding officers or the provision for trial without jury (with consent) create a constitutional infirmity.

Trial before a learned tribunal

At least one State Supreme Court has held in an analogous case that trial before inferior judicial officers may violate the 14th Amendment's guarantee of due process of law. In *Gordon v. Justice Court*,³¹ the California Supreme Court found that use of a non-attorney judge (permitted under California law in courts exercising powers somewhat comparable to those now held by U.S. magistrates) in State trials of minor misdemeanors punishable by imprisonment denied due process to defendants. The California court seemed persuaded by an argument that an attorney-judge was essential if defendants were to receive the full value of State-provided defense counsel guaranteed to them in such cases.

Th U.S. Supreme Court expressly rejected this argument in *North v. Russell*, 44 U.S.L.W. 5085 (1976), ——— U.S. ———, holding that an accused charged with a misdemeanor for which he is subject to imprisonment is not denied due process or equal protection of the laws when tried before a non-lawyer police court judge in Kentucky, when a new trial of right is available in the Circuit Court. While non-lawyers may be appointed as part-time U.S. magistrates in exceptional cases where lawyers are not available, 28 U.S.C. § 631(b), there are now only three such magistrates and they are located in remote areas. There seems no more reason to assume that the judges of district courts will needlessly appoint unqualified persons to the magistracy and then specially designate them to conduct trials than to assume that the President and Senate will appoint non-lawyers as Article III judges of the district courts simply because there is no statute which requires such judges to be attorneys. The courts exercise a reasoned judgment in the selection of magistrates qualified for judicial duties by training, as well as temperment and experience. There is no reason to believe, therefore, that litigants will be denied the opportunity to appear before a learned tribunal when their cases are heard by federal magistrates.

Jury trials

Will a litigant be denied a right to trial by jury if tried before a magistrate? In criminal cases the right to jury trial is guaranteed in both Article III, Section 2 and in the Sixth Amendment. However, except in cases of petty offenses—which were traditionally tried before non-judicial officers at the time of adoption of the Constitution, and do not now invoke trial by jury, *Duncan v. Louisiana*, 391 U.S. 145, 160 (1967), litigants will appear before magistrates only when they have knowingly, intelligently, and voluntarily consented to relinquish that right, and have done so in writing. Such a waiver fully satisfies the conditions that must be met before a constitutional right may be said to have been waived.³²

A criminal defendant may consent to waive the privilege against self-incrimination, *Brown v. United States*, 356 U.S. 148 (1953); the right to counsel, *Adams v. United States*, 317 U.S. 269 (1942); the right to a grand jury indictment in non-capital cases, F.R. Crim. P. 7(a); the right to be present at trial in such cases, *Diaz v. United States*, 223 U.S. 442 (1912); and the right to trial by jury, *Patton v. United States*, 281 U.S. 276 (1930). Indeed, it has been said that an accused may waive any legal privilege as long as there is no constitutional or statutory mandate or public policy consideration which prohibits it, *Schick v. United States*, 195 U.S. 65 (1904). Thus, there appears to be no constitutional obstacle that would prevent a defendant in a criminal case, from lawfully waiving his right to trial by jury in an appearance before a magistrate.³³

The Seventh Amendment guarantees litigants a corresponding right to jury trial in all suits where the right existed at common law and where the amount in controversy exceeds twenty dollars. The Amendment governs all courts which sit under the authority of the United States,³⁴ including those in the territories and the District of Columbia.³⁵ A federal court enforcing a state-created right

³¹ 12 Cal. 3d 323, 525 P. 2d 72 (1974).

³² See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *Barker v. Wingo*, 407 U.S. 514, 523-29 (1972).

³³ In a criminal case, the Government and court must also assent to a non-jury trial. A refusal by either the prosecutor or the court to grant a defendant's request that he be allowed to waive a jury trial denies him no right, since he then gets what the Constitution guarantees, a jury trial: *Singer v. United States*, 380 U.S. 24 (1965).

³⁴ *Pearson v. Yendell*, 95 U.S. 294, 296 (1877); *St. Louis K. C. Land Co. v. Kansas City*, 241 U.S. 419 (1916).

³⁵ See, e.g., *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899).

will ordinarily preserve this allocation of the fact-finding function between judge and jury, a rule based on the interests of the federal court system rather than the Seventh Amendment itself.³⁵

Under the Federal Rules of Civil Procedure, any party may make a timely demand for trial by jury on any issue triable of right before a jury. Failure to do so by serving a written demand therefor on the other parties constitutes a waiver of the right.³⁷ However, a waiver will not be implied from a request for a directed verdict.³⁸ Therefore a trial may be had before a magistrate without the presence of a jury in cases where suit in question is not a suit at common law within the meaning of the Seventh Amendment,³⁹ or where no party entitled to such trial makes a written demand under Rule 38.

United States as defendant

When a civil case involves suit against the United States, it is even less likely that a non-jury trial before a federal magistrate would infringe the Seventh Amendment guarantee. That Amendment guarantees trial before a jury only in "suits at common law" as the term was understood in 1789, *Parsons v. Bedford*, 28 U.S. (3 Pet.) 443, 445-8 (1830). It does not apply to cases in admiralty or maritime jurisdiction, *Romero v. Int. Terminal Operating Co.*, 358 U.S. 354 (1959), or to statutory proceedings unknown at common law, such an appeal to a court of equity to enforce an order of an administrative body, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 48, *Yakus* 1. United States, 321 U.S. 414, 417 (1944). In actions unheard of at common law, the Seventh Amendment gives a right to trial before a jury only where the action involves rights and remedies of the sort traditionally enforced in an action at law, *Pernell v. Southall Realty*, 415 U.S. 363 (1974), action such as it was proper to assert in courts of law and by the appropriate modes and proceedings of law in 1789, *Shields v. Thomas*, 18 How. (59 U.S.) 253, 262 (1856).

Suits against the United States are not trials at common law within the meaning of the Seventh Amendment, and so do not involve a right to trial by jury. *See Glidden v. Zdanock*, *supra*. This is because the United States, as sovereign, was not amendable to suit at the common law. When it consents to submit to suit in particular instances, it is master of the forum and terms of that consent. Therefore, actions for monetary claims against the United States—in both the district court and the Court of Claims—are tried by the court without a jury. *See* 28 U.S.C. §§ 2402, 1346. Furthermore, the Supreme Court has held that provisions for actions against the United States under both the Tucker Act, 24 Stat. 505, and the Federal Tort Claims Act, 60 Stat. 842, 843, 28 U.S.C. 2671 et seq., are exercises of Congress' power under Article I to pay debts of the United States, and do not involve power conferred under Article III. *See Brooks v. United States*, 337 U.S. 49 (FTCA), and *United States v. Sherwood*, 312 U.S. 584, 591 (Tucker Act). Thus, on either ground such suits do not give rise to a right to jury trial, and in consenting to adjudication of claims against it the United States may specify the forum in which the adjudication takes place.

Appellate review

The provision for appellate review of magistrates' decisions further supports the constitutionality of trial by magistrates. When considering passage of the Federal Magistrates Act in 1967, Congress evidently viewed the availability of immediate appeal to the district court as one element which—standing alone—would support trial of minor offenses before magistrates.⁴⁰ The Committee Report points to "[t]rials by administrative officers, by the Tax Court of the United States, and by United States commissioners [as] instances under present law in which appellate jurisdiction is held sufficient to maintain the essential attributes of the judicial powers." *Id.*, at 31. Appellate review is not, of itself, an element of due process of the laws. *See, e.g., Ortwein v. Schwab*, 410 U.S. 656 (1973) even in criminal cases. 14th Amendment due process clause does not require a State to provide an appellate system); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (if full and fair trial on the merits is provided, due process does not require a State to provide appellate review). To the extent that constitutional

³⁵ *Burd v. Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958).

³⁷ Federal Rules of Civil Procedure 38.

³⁸ *Actna Life Ins. Co. v. Kennedy*, 301 U.S. 398 (1937); F.R.C.P. 50(a).

³⁹ *See, e.g., McElrath v. United States*, 102 U.S. 426, 440 (1880) (Suits to enforce claims against the United States); *Katchen v. Tandy*, 382 U.S. 323 (1966) (Summary disposition of issues by referee in bankruptcy).

⁴⁰ S. Rept. 371, 90th Congress, 1st Session, 30-31.

guarantees are involved, however, due process may require judicial review of administrative action to assure that fairness has been accorded in the administrative proceeding. *See, St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936); *Lewis Dancy, Inc. v. Freeman*, 401 F.2d 308, cert. denied 394 U.S. 929 (1968). On the other hand, an administrative agency is fully competent to make an initial determination of jurisdictional or constitutional issues raised before it. *See, Presque Isle TV Co. v. United States*, 387 F.2d 502 (1967) (requirement that a party appearing before the Federal Communications Commission raise a jurisdictional question in the Commission before presenting it for judicial review does not deny process under the 5th Amendment).

Appellate review may most nearly become an element of due process in the absence of an alternative remedy to assure the fairness of a proceeding below. *Compare Yakus v. United States*, 321 U.S. 414 (1944) (exclusive jurisdiction to attack emergency price regulations in Temporary Emergency Court of Appeals was construed not to ban attack on statute pursuant to which regulations were issued as part of criminal defense in another forum); *In Re McArdle*, 73 U.S. 318 (1868), (alternate habeas corpus jurisdiction in Supreme Court left unaffected by Congressional repeal of primary habeas jurisdiction).

Although not necessarily required by due process, an appeal of right from magistrates' decisions to the district courts adds significant elements of protection for the rights of litigants and defendants in cases tried before magistrates. Whatever procedural irregularities or errors of law may have occurred at trial may be examined by the reviewing Article III district judge on request by a party against whom judgment is entered by the magistrate, under standards no less rigorous than those now applied to review of administrative decisions by executive agencies and hearing officers.

Cases tried in the first instance before the Tax Court (an Article I or "legislative" court whose judges serve for 12 years) and before State courts (whose judges are often elected at large or appointed by the State legislature) are situations in which ultimate appellate jurisdiction in Article III courts provide an example of Mr. Justice Story's view of the mode by which Article III power may be exercised and protected in the federal courts:

the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 332 (1816).

Provision for discretionary review by the Courts of Appeal adds to these protections, and further guards against errors of law on the part of the magistracy. Appellate review of magistrates' decisions by Article III judges reinforces the constitutional validity of trial before magistrate, providing a judicial means for determining that litigants have received the fair trial in a fair tribunal required by due process of law.

6. CONCLUSIONS

The Constitution does not require that every action within the judicial power of the United States be brought in a court created under Article III and tried by a judge of that court. Federal courts have traditionally used non-tenured judicial officers to aid them in the exercise of their jurisdiction, retaining control by their powers of appointment and review. Magistrates appointed by those courts and designated by them to conduct trials act under the direction and control of the courts in a fashion that does not invade the jurisdiction of the Article III court or threaten the independence and integrity of the federal judiciary. Litigants and defendants who appear before magistrates' courts will be afforded the full process of law guaranteed them by the Constitution. Moreover, the decision of a magistrate is subject to review, as of right, by an Article III judge. For all these reasons, there is no sound constitutional basis for objection to permitting magistrates to try civil and criminal cases, subject to the limitations discussed above.⁴¹

⁴¹ For a comprehensive treatment of the principles governing use of non-tenured judicial officers in civil cases through 1974, see the memorandum prepared by the Jurisdiction Subcommittee of the Committee on the Administration of the Federal Magistrates System of the Judicial Conference of the United States, titled "Constitutional and Statutory Principles Governing the Delegation of Duties to Magistrates", dated December 19, 1974. The staff of the Senate Judiciary Committee also prepared an excellent analysis of the constitutionality of trial of minor offenses by U.S. magistrates, which is printed at pages 246-256 of the Hearings on S. 3475 and S. 945 before the Subcommittee on Improvements in Judicial Machinery, 90th Congress, 1st Session (1967).

(2)

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE,
Washington, D.C. January 19, 1978.

SUBJECT: CONSTITUTIONALITY OF CONSENT TO TRIAL BEFORE A FEDERAL MAGISTRATE

I.

Federal magistrates may try minor crimes and offenses when specially designated to do so by a judge of the district court and when the defendant consents.¹ Under present law, any person charged with a minor offense may elect, instead, to be tried before a judge of the district court.² In each case the magistrate must carefully advise the defendant of his right to trial before a judge, and trial may not proceed before the magistrate unless, following explanation, the defendant signs a written consent which specifically waives both a trial before a judge and any right to trial by jury he may have.³ Guidelines issued by the Committee on the Administration of the Federal Magistrates System (a committee of the Judicial Conference of the United States) also permit the district courts to adopt local rules permitting magistrates to conduct civil trials, given the consent of the litigants.⁴

Article III of the Constitution vests the judicial power of the United States in "one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish . . ." Judges of these "Article III courts" hold office during good behavior, must be appointed by the President with the advice and consent of the Senate, and enjoy salaries which may not be diminished while in office.⁵

Since magistrates are appointed directly by the district courts⁶, serve for terms of eight years rather than for life⁷, and are protected from reductions in salary only by statute⁸, they cannot be considered judges of the district courts in which the judicial power is vested. The jurisdiction exercised by magistrates at trial is clearly that of the Article III federal district court⁹, and the Article III district judge directly supervises the magistrate's actions.¹⁰

Nevertheless, doubts have been expressed that defendants cannot constitutionally consent to trial before the magistrate rather than before the district judge:¹¹ Because consensual reference to trial before federal magistrates is retained as a chief element of current proposals to widen magistrates roles in the trial of misdemeanors and civil actions¹², these objections must be carefully considered.

II. JURISDICTION

The first major ground for objection to consent trials before federal magistrates is based on a challenge to their jurisdiction. It is said that the purpose and protections of Article III go to preserving the courts' subject-matter jurisdiction, and that such defects cannot be waived or cured by consent.¹³ In effect, the ar-

¹ See 28 U.S.C. § 636(a) (1970 ed.); 18 U.S.C. § 3401 (1970 ed.). With certain exceptions listed in 18 U.S.C. § 3401(f), the term "minor offense" includes all Federal misdemeanors for which the penalty does not exceed 1 year of imprisonment, or a fine of not more than \$1,000, or both. *Id.*

² 18 U.S.C. § 3401(b) (1970 ed.)

³ *Id.*

⁴ "Printed at Hearing on the Jurisdiction of U.S. Magistrates Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary," 94th Congress, 1st session 22 (1975) (exhibit A). (Hereafter 1975 *Hearings*).

⁵ Constitution of the United States, article III, § 1.

⁶ 28 U.S.C. § 631(a) (1970 ed.).

⁷ 28 U.S.C. § 631(e) (1970) (Full-time magistrates. Part-time magistrates are appointed for 4-years terms, *id.*).

⁸ *Id.*, § 634(b).

⁹ "... the jurisdiction exercised by the magistrate is the jurisdiction of the court itself." *H.R. Rep.* No. 1629, 90th Congress, 2d session 19 (1968) (hereafter House Report). "When a case is tried before a magistrate, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate." *Hearings on S. 3575 Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary*, 89th Congress, 2d session (1966), at 256 (hereafter 1966 *Hearings*).

¹⁰ 28 U.S.C. § 636(h) (1970).

¹¹ See, e.g., Testimony of Assistant Attorney General Fred M. Vinson, Jr. (Criminal Division, U.S. Department of Justice), printed in 1966 *Hearings, supra.*, 109, 129.

¹² S. 1613, 95th Congress, 1st session (1977).

¹³ Note 11, *supra.*

gument is that the jurisdiction of a federal court must be exercised through the person of an Article III judge of that court.

The federal courts are courts of limited jurisdiction, and may exercise only such jurisdiction as is authorized by the Constitution and has been delegated to them by the Congress.¹⁴ Since only the Congress may confer jurisdiction on a federal court, it has long been the rule that the parties to a case cannot waive lack of subject-matter jurisdiction, whether by express consent, by conduct, or by estoppel.¹⁵ A corollary, embodied in Rule 12(h)(3) of the Federal Rules of Civil Procedure, is that lack of subject-matter jurisdiction is always open to notice and objection. Jurisdiction over the person, however, is a waivable defect, which must be asserted by the party who would take advantage of it, or be lost.¹⁶

It is the court, not the judge, to which these doctrines of subject-matter jurisdiction apply.¹⁷ Section 1 of Article III vests the judicial power of the United States in the courts and provides for life tenure of judges, but it does not require that an Article III judge must preside over every proceeding within the jurisdiction of a federal court.

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. *Palmore v. United States*, 411 U.S. 389, 407 (1973).

Does trial before a federal magistrate violate the principle that the parties cannot confer subject-matter jurisdiction by consent? The magistrate exercises no independent jurisdiction. He or she sits only by designation of the district court and, in non-petty cases, only with the consent of all parties. The magistrate exercises only that subject-matter jurisdiction which is authorized by the Constitution, delegated to the district court by Act of Congress, and designated by the court itself to be available through its magistrate with the consent of the parties.

The magistrate's power to perform judicial functions depends entirely upon his connection with the district court which appoints him and retains the right to control and supervise his conduct at all times. Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consents merely to an alteration on trial procedure, not to a transfer of jurisdiction from the district court to another tribunal.¹⁸

By consenting to trial before a federal magistrate, rather than a district judge, the parties do not reduce the jurisdiction of the district court or confer on the magistrate a jurisdiction which is otherwise lacking. Unless the consent is invalid, the procedure poses no risks to the authority of the court or the rights of the litigants.

III. CONSENT

The Constitution guarantees an enviable range of substantive and procedural rights to both civil litigants and criminal defendants, virtually all of which may be waived by one willing to do so. We do not compel citizens to vote, to bear arms as part of a well-regulated militia, to assemble to petition for a redress of grievances, or to exercise the right of free speech. While the availability of these rights is guaranteed, their use is almost invariably voluntary and by consent. Indeed, it has been said that even an accused criminal defendant may consent to waive the exercise of any legal right or privilege as long as there is no constitutional or statutory mandate or public policy consideration which prohibits it.¹⁹ While this formulation probably goes too far today, the thrust of the decided cases strongly supports the right of a civil litigant or criminal accused

¹⁴ Wright, *Federal Courts*, 3d ed. (1976) at 17; *Turner v. Bank of North America*, 4 Dall. 8 (1799).

¹⁵ *Jackson v. Arkton*, 8 Pet. 148 (1834) (consent); *M. C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884) (estoppel) and *Mitchell v. Maurer*, 293 U.S. 237 (1934) (failure to object).

¹⁶ Fed. R. Civ. P. 12(h)(1). See also, *Petrovski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495 (1956).

¹⁷ See, e.g., Silberman, *Masters and Magistrates* part II, 50 N.Y.U.L. Rev. 1297, 1350 (1975), and the excellent staff memorandum printed at page 246 of the "Hearings on the Federal Magistrates Act Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Com. on the Judiciary," 89th Congress, 2d session, 90th Congress, 1st session (1966 Hearings).

¹⁸ 1966 Hearings, *supra*, 252 (citation omitted).

¹⁹ *Schick v. United States*, 195 U.S. 65 (1904).

to knowingly, intelligently, and voluntarily consent to waive rights which are otherwise guaranteed under the Constitution and laws of the United States.

a. Consent by Criminal Defendants

The Constitution is especially solicitous of the rights of persons accused of criminal offenses. In virtually every instance, the Supreme Court has held that a criminal accused may lawfully consent to waive even the most fundamental of these rights. Even a partial list is lengthy. Among others, a criminal defendant is entitled to consent to the following waivers of rights otherwise guaranteed: The Fifth Amendment privilege against compelled self-incrimination, *Garner v. United States*, 424 U.S. 648 (1976); *Rogers v. United States*, 346 U.S. 367 (1951); The Fourth Amendment right to be free from unreasonable or warrantless searches, *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Amos v. United States*, 255 U.S. 313 (1921); The right to a speedy trial under the Sixth Amendment, *Barker v. Wingo*, 407 U.S. 514, 530 (1972); The right to a jury trial in a criminal case, guaranteed both by Article III and the Sixth Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *Patton v. United States*, 281 U.S. 276 (1930); The right to confront and cross-examine hostile witnesses under the Sixth Amendment, *Brookhart v. Janis*, 384 U.S. 1 (1966); The right to be represented by counsel, *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938); compare, *Farretta v. California*, 422 U.S. 806 (1975) (defendant's right to reject appointed counsel); The right to be present at each stage of a criminal proceeding, *Illinois v. Allen*, 397 U.S. 337 (1970); *Diaz v. United States*, 223 U.S. 442 (1912); and the right to be free from indictment in a non-capital case except upon presentment to a grand jury, Fed. R. Crim. P. 7(a).

Perhaps the most significant instances in which an accused has been held to enjoy the right to consent to voluntarily relinquish other rights as a criminal defendant are those concerning guilty pleas at trial. A plea of guilty is, in effect, a waiver of the right to put the government to its proof. If accepted by the court, it waives the accused's constitutional rights in almost every respect, including the privilege against self-incrimination, the right to a trial by jury, and the right to confront one's accusers, and it operates as a conviction of the offense charged, *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). See also *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973) (voluntary guilty plea also bars both direct and collateral challenges to constitutional and other defects that occurred prior to the plea), *Parker v. North Carolina*, 397 U.S. 790, 798-99 (1970), although it does not preclude later challenges to the subject-matter jurisdiction of the court, *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974). Indictment by a grand jury which had been improperly extended, for example, has been held to be a jurisdictional defect in the Second Circuit, *United States v. Macklin*, 523 F. 2d 193, 196 (2d Cir. 1975).

b. Consent by Civil Litigants

Consent plays an equal or greater role in civil litigation. See generally, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi.L.Rev. 584 (1973) for representative examples. Civil litigation necessarily represents a deliberate choice by one or all parties to commit a dispute to the judicial forum, and in this respect differs fundamentally from criminal litigation. Yet many of the rights involved are similar. For example, the right to trial by jury is guaranteed in both criminal and civil litigation (although not in all classes of cases). Litigants are guaranteed the right to trial by jury in civil cases at common law where the amount in controversy exceeds \$20, by the Seventh Amendment to the Constitution, yet the right is not one which compels a jury trial in every such case. Prior to adoption of the Federal Rules of Civil Procedure it had long been the law that the parties to a civil action might enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, without statutory provision for waiver, *Henderson's Distilled Spirits*, 81 U.S. 44, 53 (1872); *Rogers v. United States*, 141 U.S. 548, 554 (1891), or with such a provision, *Bayls v. Traveller's Ins. Co.*, 113 U.S. 316, 321 (1885). Rule 38 now provides that any party to a civil action may make a timely demand for trial by jury of any issue triable of right before a jury. Failure to so serve a demand constitutes a waiver of the right. However, a waiver will not be implied from a request for a directed verdict, *Actna Life Ins. Co. v. Kennedy*, 301 U.S. 389 (1937).

A person may also consent to be bound by a judgment in a civil case in which he has no right to participate, *Beall v. New Mexico*, 83 U.S. 535 (1873); *United*

Surety Co. v. American Fruit Co., 238 U.S. 140 (1915), and would have no justifiable case or controversy within the court's jurisdiction if present as a party.

The right to consent to a civil trial before a person other than an Article III judge is long-established. In *Field v. Holland*, 6 Cranch (10 U.S.) 8, 21 (1810), the documents at issue had been referred to an auditor for examination only, but the court indicated that had the case been referred for a full decision, the master's award would be binding. In *Heckers v. Fowler*, 2 Wall. (69 U.S.) 123 (1884), the parties agreed to send their dispute to a referee, with his report "to have the same force and effect as a judgment of the court." The court compares this arrangement to the established power of a court to conduct a "trial by arbitrators . . . with the consent of both parties." *Id.*, at 128. Similarly the court approved a consensual referral to a master for final determination in *Kimberly v. Arms*, 129 U.S. 512 (1889). And in the recent case of *DeCosta v. CBS, Inc.*, 520 F.2d 499 (1st Cir. 1975), the First Circuit panel upheld the validity of the parties' stipulation to refer a dispute over the rights to the "Paladin" TV character to a magistrate for hearing, over a later objection by the defendant.

c. Standards for Waiver

The Supreme Court has defined a waiver of rights under the Constitution as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Where important rights are at issue, courts should "indulge every reasonable presumption against waiver," *Aetna Life Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and they should "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307. In many areas, presuming waiver from a silent record is impermissible. "The record must show" that an accused was offered but intelligently and understandably rejected the offer. "Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506 (1962) (right to counsel). Compare, however, *Fed.R.Civ.P.* 38, where the right to trial by jury is automatically lost unless a party positively asserts the right.

In order for a waiver of constitutionally-guaranteed rights to be valid, it must be knowingly, voluntarily, and intelligently given. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel in criminal trial) and *Bumper v. North Carolina*, 391 U.S. 543 (1968) (consent to warrantless search). In criminal cases the burden is on the prosecution to prove both the voluntariness of consent, and awareness of the right of choice. *Id.*; *Johnson v. United States*, 333 U.S. 10, 13 (1948).

It was once the rule that a privilege must be explicitly claimed or it would be deemed to have been waived, *Rogers v. United States*, 340 U.S. 367 (1951) (privilege against compelled self-incrimination), but that rule has been largely abandoned. The Court now seems to prefer to reserve "waiver" for "the process by which one affirmatively renounces the protection of the privilege." *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976) (privilege against compelled self-incrimination) (emphasis supplied).

A variety of factors may impair the voluntariness of a waiver, even though knowingly and intelligently made. Under *Fed.R.Crim.P.* 11(d), for example, a federal court must assure that a guilty plea is not induced by threats and promises apart from the plea agreement, and must determine whether the plea has been induced by prior discussions between the prosecutor and the defense attorneys. Voluntariness may also be absent when the defendant is incompetent at the time of the plea, *Saddler v. United States*, 531 F.2d 83, 85 (2d Cir. 1976), or where the plea is based upon incompetent advice of counsel, *Hammond v. United States*, 528 F.2d 15, 18 (4th Cir. 1975).

Although rule 11 is not binding on state courts, the record of a state trial must show that a defendant's plea is voluntary, that he knowingly and intelligently waived his constitutional rights, and that he did so with a full understanding of the consequences of the plea. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). See also, *Henderson v. Morgan*, 426 U.S. 637 (1976). But while a plea induced by unkept promises to the defendant is ordinarily not voluntary, *Harris v. Superintendent*, 518 F.2d 1173, 1174 (4th Cir. 1975), failure to inform the defendant of the minimum and maximum penalties does not negate the voluntariness of a plea. *Yellowwolf v. Morris*, 536 F.2d 813, 815-16 n.2 (9th Cir. 1976).

Entered in the presence of the court, guilty pleas are arguably freer from many forms of physical or psychological coercion which have been held to invalidate waivers of constitutional rights in other circumstances. Although it found there is "no talismanic definition of 'voluntariness,' mechanically applicable" in all

situations involving alleged consent to a warrantless search, for example, the Court in *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973), has suggested a number of factors to be considered: the age, education and intelligence of the person giving consent; the presence or absence of advice of his constitutional rights to withhold consent; the length of detention prior to consent; and the use of physical punishment. *Id.*, at 226. And the Government must itself establish the absence of duress or coercion, express or implied, in obtaining the needed consent. *Id.*, at 227; *United States v. Rothberg*, 460 F.2d 223, 224-5 (2d Cir. 1972).

The voluntariness of consent is a question of fact to be decided by the court. *Hoover v. Beto*, 467 F.2d 516 (5th Cir.—cert. denied 409 U.S. 1086 (1972)), based on the totality of all the facts and circumstances of the particular case. *Schneckloth, supra*. When the Government relies upon a defendant's consent, it has the burden of proving that the consent was in fact freely and voluntarily given. *Bumper, supra*, at 548. The Supreme Court has made it clear that the burden of proof in suppression hearings where consent is challenged, however, "should impose no greater burden than proof by a preponderance of the evidence." *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974).

IV. CONSENT TO TRIAL BEFORE A FEDERAL MAGISTRATE

The remaining issue is whether proposals for trial by consent of the parties before federal magistrates violate the standards identified in Part III of this memorandum. In brief, those standards require that a valid consent to waive constitutional or procedural rights at trial or at critical stages of the judicial process must be knowing, voluntary, and intelligent. If consent is obtained from one who is unaware of the importance of his action or unknowing of the alternatives, it fails the first test. If hidden or overt compulsion forces the consent, it cannot be called voluntary. And if consent is obtained from a person who has not been afforded an opportunity to consider the decision, or who is incapable of intelligently deciding, the third standard is not met. The procedures suggested in S. 1613 for consent to trial before a federal magistrate appear to pass all three.

The most serious trials which could be conducted before a federal magistrate under S. 1613 are those involving criminal charges. While U.S. magistrates (and their predecessors, U.S. commissioners) have long been authorized to try cases involving petty offenses (28 U.S.C. 1(3), 3401), S. 1613 authorizes district courts to specially designate full-time magistrates to try most classes of misdemeanor as well. Before a magistrate may proceed to hear such a non-petty case, however, "the magistrate shall carefully explain to the defendant that he has a right to trial before a judge of the district court and that he has a right to trial by jury" regardless of which judicial officer presides. Proposed 28 U.S.C. 3401(b). The magistrate may not try any case unless the defendant signs a written consent to be tried before the magistrate. The consent document must also specifically waive a trial before a judge of the district court. Trials before magistrates will automatically be tried with a jury, unless the defendant also waives a jury trial in writing with the approval of the magistrate and the consent of the prosecuting officer.

This procedure comports fully with the standards for waiver. The defendant must be personally advised of his rights in open court, by a qualified and specially designated federal magistrate. Since the magistrate must personally explain those rights, there is no apparent risk that the explanation will be incomplete or distorted by investigative or prosecuting officers. Defendant's consent is evidenced by a written waiver, and the right to jury trial is fully preserved unless defendant separately elects to waive it as well.

This procedure assures that a defendant will be fully advised of his or her rights, that the magistrate will personally determine that defendant is making a knowing and intelligent choice, and that defendant's consent is not obtained by compulsion or coercion. The defendant's rights are automatically preserved unless the defendant personally chooses not to exercise them. A defendant's choice to exercise those rights rather than waiving them imposes no adverse consequences, since he continues to enjoy exactly what he was always entitled to trial by jury before a judge of the district court. *Cf. Singer v. United States*, 380 U.S. 24 (1965).

S. 1613 also proposes amendments to 28 U.S.C. 636(c)(1) to expand the trial role of magistrates in civil cases as well, with consent of the parties. Only those magistrates specially designated by the district court might conduct civil trials,

and trial may not proceed unless all parties consent to the designation and referral. Proposed 636(c) (2). The district judge is not to be informed of the parties' response, and may not use any inducement to persuade the parties to consent to a referral. This "blind consent" procedure further protects litigants wishing to exercise their right to trial before a district judge.

V. CONCLUSIONS

Federal magistrates specially designated by the district court may exercise the jurisdiction of that court where permitted by statute. Where the court has jurisdiction over the subject-matter in controversy, the parties may consent to any form of procedure provided by law, including trial before a federal magistrate of the court. Where that consent is knowing, voluntary, and intelligent it comports with well-accepted standards for the waiver of substantive and procedural legal rights. The procedures suggested for referral by consent of the parties in S. 1613 meet those standards.

(3)

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENT IN THE
ADMINISTRATION OF JUSTICE,
Washington, D.C., June 21, 1979.

HON. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: This is in response to your letter of April 27, 1979, in which you asked whether the proposed Magistrate Act of 1979 (S. 237; H.R. 1046) is constitutional. You also asked whether it would be constitutional if the magistrates' jurisdiction was not based on consent.

The Department of Justice considers the bill to be constitutional.¹ Numerous witnesses in past hearings have endorsed the constitutionality of this proposal,² and the Judiciary Committees of both Houses of Congress have deemed it to be constitutional.³ During the 95th Congress, both the House and the Senate passed essentially similar bills.⁴

In general concerns about the constitutionality of the bill fall into two categories. One set of objections involves the nature of the judicial system itself. The basic question is whether trial by magistrate is consistent with the constitutional vesting of federal judicial power in courts with Article III judges. The argument, in effect, is that the jurisdiction of a federal court must be exercised only through an Article III judge of that court.

Both history and authority indicate that not every Article III controversy must be decided at all stages only by an Article III judge. Until 1875, federal questions usually were heard in the first instance by non-Article III state courts.⁵ Currently, a variety of non-Article III forums enter binding judgments in federal cases, e.g., the territorial courts, the U.S. Court of Military Appeals, the Tax Court of the United States, and the courts of the District of Columbia. Moreover, it is well established that non-Article III officers of Article III courts, acting with the consent of the parties under a grant of statutory authority to exercise that subject-matter jurisdiction, and designated to do so by the district court itself, may exercise the judicial power of the court.⁶ After reviewing cases on this issue, the Supreme Court concluded that:

neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal pros-

¹ The Department has previously provided the Congress with detailed analyses of the constitutionality of this bill. Office for Improvements in the Administration of Justice, *Constitutionality of Consent to Trial Before a Federal Magistrate* (1978); Office for Improvements in the Administration of Justice, *Memorandum in Support of Constitutionality of Magistrate Act* (1977).

² See H.R. Rep. No. 95-1364, 95th Cong., 2d sess., 11 n.20 and n.21 (1978).

³ See generally *id.*; S. Rep. No. 15-344, 95th Cong., 1st sess. (1977).

⁴ 124 Congressional Record H11, 512 (daily ed. Oct. 4, 1978); 128 Congressional Record S. 12,647 (daily ed. July 22, 1977).

⁵ See Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U.L. Rev. 1297, 1316-17 (1975); Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

⁶ See *Mathews v. Weber*, 423 U.S. 261 (1976); *Ex Parte Peterson*, 253 U.S. 300, 312 (1920).

ecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction.⁷

It is important to recognize that the actual constitutional question here is not whether Congress can finally place an Article III controversy in a non-Article III forum. Rather, the question is whether Congress has the authority to grant initial jurisdiction over an Article III controversy to a non-Article III judicial officer, subject to review by an Article III court. Nothing in the language of the Constitution prevents this, and history and contemporary practice support it. Therefore, this ground for questioning the constitutionality of the bill is not persuasive.

The second set of objections concerns the personal rights of litigants and criminal defendants within the federal judicial system. The question here is whether trial by magistrate denies litigants some right to an essential element of justice that is guaranteed by the terms of Article III or another part of the Constitution. In other words, does trial by magistrate deny litigants some element of due process of law.

Litigants and defendants who appear before a magistrate will be afforded the full procedures that are guaranteed by the Constitution; indeed the only differences between a magistrate trial and a district court trial will be the character of the presiding officer. The bill requires the parties in civil cases to consent to trial before a federal magistrate of the court, and it requires this consent to be knowing, voluntary, and intelligent. Moreover, the decision of a magistrate is subject to review, as of right, by an Article III judge. In considering passage of the Federal Magistrate Act of 1967, Congress viewed either the requirement of consent and the availability of appeal to an Article III judge as an element which—standing alone—would support trial of minor offenses before magistrates.⁸ Under these circumstances, litigants are not denied due process of law.

Although the bill requires the parties to consent to the exercise of civil jurisdiction by a magistrate, you ask whether the bill would be constitutional if the magistrates jurisdiction was not based on consent. As we noted above, the Constitution appears to be satisfied by preserving an appeal by right to an Article III tribunal.⁹ Nothing in the Constitution requires an Article III controversy to be tried in an Article III forum, at least in the first instance. Congress could constitutionally prescribe magistrate jurisdiction that was not based on consent, so long as it also provided for review of right in an Article III forum.

For the preceding reasons, we conclude that a binding judgment may be entered in an Article III controversy by a United States magistrate, subject to appeal by right to an Article III judge, where Congress has authorized the exercise of such jurisdiction.

Sincerely,

DANIEL J. MEADOR,
Assistant Attorney General.

(b) By Judicial Conference of the United States

(1)

JUDICIAL CONFERENCE OF THE UNITED STATES

COMMITTEE ON THE ADMINISTRATION OF THE FEDERAL MAGISTRATES SYSTEM

(January 30-31, 1978)

COMMENTS ON S. 1613—THE MAGISTRATE ACT OF 1977

At its September 1977 meeting the Judicial Conference approved most of the provisions of S. 1613, the Administration bill sponsored by Senators DeConcini and Robert Byrd, to improve access to the federal courts by enlarging the civil and criminal jurisdiction of United States magistrates. Nevertheless, the Conference noted that the provisions in S. 1613 for jury trials before magistrates and direct appeals to the courts of appeals were new concepts which required further study

⁷ *Palmore v. United States*, 411 U.S. 389, 407 (1973).

⁸ S. Rept. No. 371, 90th Congress, 1st session, 30-31 (1967).

⁹ *Id.*; see generally Silberman, *supra*.

and inquiry before the Conference could express a considered opinion upon them.¹

Your Committee has conducted such a study, and it finds no constitutional impediment or compelling policy reason to prevent the parties from freely consenting to have a United States magistrate try a civil or criminal misdemeanor case in the district court before a jury. The Committee also believes that the provision in S. 1613 which permits the parties, upon mutual consent, to opt for direct appeal to the court of appeals, as an alternative to the normal procedure of appeal to a district judge, would encourage the parties to consent to magistrate trial and disposition in appropriate cases and expedite handling of litigation in the federal courts.

Accordingly, in light of the policy of the Judicial Conference and of the Administration to encourage the effective utilization of magistrates in the federal courts to reserve the limited time of Article III judges for work which only they can perform, your Committee recommends that the Conference endorse S. 1613 as passed by the Senate.

BASIC CONSTITUTIONAL CONSIDERATION²

A. The Judicial Power of the United States Under Article III

Article III of the Constitution declares that "the judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."³ Justices of the Supreme Court and judges of the lower courts created by the Congress under article III are entitled to hold office during good behavior, and they may not have their salaries diminished while in office.

The Constitution itself gives original jurisdiction in certain enumerated cases to the Supreme Court. The appellate jurisdiction of the Supreme Court, however, as well as the jurisdiction of the lower federal courts, are left to the control of the Congress. The power of the Congress to regulate the types of cases that may be brought in the several federal courts has generally been regarded as "plenary" in nature.⁴

The lower federal courts, thus, are courts of limited jurisdiction and may only exercise jurisdiction as is authorized by the Constitution and delegated to them by the Congress.⁵ The Congress has the power to create, alter and abolish inferior federal courts.⁶ Under this authority the courts have in fact been reshaped and reorganized several times since 1789, and changes in the laws regulating the federal judiciary in various measure are introduced at every session of the Congress.⁷ The Congress may constitutionally designate a particular court for deciding specific types of cases or questions to the exclusion of all other federal courts.⁸ It may also specify the authority of the various courts to grant particular types of remedies.⁹

¹ Report of Proceedings, at pp. 62-63.

² Much of the material in this section is based on the report of the Judicial Conference to the Congress in March 1975 in support of its proposed legislation to clarify and expand the jurisdiction of magistrates, which was subsequently enacted as Public Law 94-577 in October 1976.

³ U.S. Const., art. III, § 1. The judicial power is defined in section 2 of the article as extending: (1) To all cases in law and equity arising under the Constitution, laws, and treaties of the United States; (2) to cases affecting ambassadors, ministers, and consuls; (3) to cases in admiralty; (4) to controversies to which the United States is a party; and (5) to controversies between states or between citizens of different states.

⁴ See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Gladden Co. v. Zdanok*, 370 U.S. 530 (1962). Except for the provision in article III, § 2, cl. 2, as to the appellate jurisdiction of the Supreme Court, there is no explicit clause in the Constitution granting Congress unbridled authority. It is a function, however, which the Congress assumed immediately, and the authority has been upheld consistently. See also *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10, (1799); *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868); *Kline v. Burke Const. Co.*, 260 U.S. 226 (1922).

⁵ C. Wright, *Handbook of the Law of Federal Courts*, 2d ed. (1970) § 7. [Hereinafter cited as Wright, *Federal Courts*]. *Turner v. Bank of North America*, supra note 4. *National Mutual Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 607 (concurring), 639-41 (dissenting), 652 (dissenting) (1949).

⁶ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); *Harlan v. Penn. Ry. Co.*, 180 F. Supp. 725 (W.D.Pa. 1960).

⁷ See, for example, H.R. 8200, which passed the House of Representatives on Feb. 1, 1978. The bill would create a nationwide system of art. III bankruptcy courts parallel to the U.S. District Courts.

⁸ See *Lockerty v. Phillips*, 319 U.S. 182 (1943). The Court of Claims for example, has exclusive jurisdiction over claims against the United States for money damages under the Tucker Act which exceed \$10,000. 28 U.S.C. §§ 1346, 1491. Patent infringement suits against the United States, likewise, must be filed in the Court of Claims, 28 U.S.C. § 1498.

⁹ See, for example, 28 U.S.C. chapters 91, 93 and 95. *Lauf v. E. G. Shinner and Co.*, 303 U.S. 323 (1938).

No question can be raised of Congress' freedom, consistently with article III, to impose . . . a limitation upon the remedial powers of a federal court.¹⁰

While article III states that the judicial power of the United States "shall" be vested in the Supreme Court and the inferior federal courts, the Congress is not required to actually vest the entire judicial power in any or all of the federal courts.¹¹ Indeed, at no time has the entire constitutional power under article III been conferred upon any federal court. The district and circuit courts, for example, had not federal question jurisdiction until 1875.¹² The Congress has also consistently imposed a jurisdictional monetary amount on diversity cases and some federal question cases.¹³

The Supreme Court declared in 1845 that—

[T]he judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.¹⁴

B. Other Bases of Federal Judicial Power

While article III defines the "judicial power" of the United States, courts have also been granted jurisdiction by the Congress under other articles of the Constitution. The Supreme Court in 1828 first enunciated the doctrine of legislative" courts, in holding that a court created by the Congress for the Florida Territory, whose judges did not "enjoy life tenure or undiminished protection," could adjudicate an admiralty dispute—a case falling within the purview of article III. That court was held to be legitimately established under Congress' power to make "all needful rules and regulations respecting the territory belonging to the United States."¹⁵

The territorial courts have been traditionally deemed not subject to all the strictures of article III, even though they dispose of cases or controversies that would clearly be within the judicial power of the United States if arising within the states.¹⁶ The judges of the territorial courts do not enjoy article III status: yet they exercise the same jurisdiction, apply the same federal laws, follow the same federal procedures, and try jury and nonjury federal cases in the same manner as the article III judges of the district courts.¹⁷

Apart from territorial considerations, the Congress may establish specialized courts under article I and empower the judges of such courts to try and determine civil and criminal cases and enforce basic rights, without providing the various protections of article III.¹⁸ The Congress has in fact created legislative

¹⁰ *Glidden Co. v. Zdanok*, 370 U.S. at 557.

¹¹ See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 65-70 (1923). Although the terms are commonly confused, "judicial power," as used in art. III, is distinguishable from "jurisdiction." The term "judicial power" has been defined by the Supreme Court as "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Muskat v. United States*, 219 U.S. 346, 361 (1911). It is the "power to decide 'cases' and 'controversies' in the conformity with law and by the methods established by the usages and principles of law." E. Corwin, *The Constitution and What It Means Today*, 161 (13th ed. 1973). See *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908). "Jurisdiction," on the other hand, is "the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case." Corwin, *supra* at 161. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹² See *Wright, Federal Courts* 5; *Act of Mar. 3, 1875*, 18 Stat. 470.

¹³ Consideration is in fact being given at this time by the House Judiciary Committee to proposals endorsed by the Judicial Conference which would alternatively: (a) abolish diversity jurisdiction entirely; (b) abolish some diversity cases; and (c) raise the jurisdictional monetary amount on diversity cases.

¹⁴ *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845). See also *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511 (1898); *Kline v. Burke Const. Co.*, 260 U.S. 226 (1922); *Lockerty v. Phillips*, 319 U.S. 182 (1943).

¹⁵ *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

¹⁶ *Palmore v. United States*, 411 U.S. 389, 397-99, 402-03 (1973). See also *In re Ross*, 140 U.S. 453 (1891); *O'Donoghue v. United States*, 289 U.S. 516 (1933).

¹⁷ See, for example, 48 U.S.C. §§ 1611-1617 (Virgin Islands).

¹⁸ *Swain v. Pressley*, 430 U.S. 372 (1977); *Palmore v. United States*, 411 U.S. 389 (1973); *Williams v. United States*, 289 U.S. 553 (1933); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

courts to decide a wide variety of federal questions, such as military discipline,¹⁹ taxation,²⁰ and foreign affairs.²¹ It has also created a host of administrative agency boards in the executive branch to decide controversies arising under federal law, subject to limited appeal to the "constitutional courts."²²

C. The Need for an Article III Judge to Decide Controversies

Although the Supreme Court has not fully determined the extent to which the Congress may commit the execution of "inherently" judicial business to tribunals other than article III courts,²³ a wide variety of cases arising under the federal judicial power have traditionally either been heard in the first instance or actually decided by officers who do not enjoy the constitutional protections of secure tenure and undiminished compensation.

(1) Non-Article III Tribunals

State courts have been given jurisdiction by the Congress to determine various cases arising under the Constitution and laws of the United States.²⁴ Federal legislative courts and administrative agencies in the executive branch have been assigned fact-finding and decision-making functions by the Congress in many specialized areas of federal law—including areas historically subject to common law adjudication.²⁵

The Supreme Court has never held that judicial power is improperly vested in administrative agencies, although the question has arisen frequently in cases involving, *inter alia*, aliens,²⁶ unreasonable obstructions to navigation,²⁷ the Selective Service Draft Law,²⁸ the statutory interpretation of railroad regulation,²⁹ and coal price-fixing.³⁰ In *Reconstruction Finance Corp. v. Bankers Trust Co.*,³¹ for example, the Supreme Court rejected the petitioner's argument that "by article III, § 1, the judicial power of the United States is vested exclusively in the courts and matters of private right may not be relegated to administrative bodies for trial."³²

In *Crowell v. Benson*,³³ a suit under the Longshoremen's and Harbor Workers' Compensation Act, the Court held that even in cases of "private right" the facts need not necessarily be determined by article III judges in order to maintain the essential attributes of judicial power.

For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.³⁴

Further—

The Constitution declares that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts

¹⁹ 10 U.S.C. § 867 (1972). See *O'Callahan v. Parker*, 395 U.S. 258, 261-62 (1969); *Reid v. Covert*, 354 U.S. 1 (1957).

²⁰ 26 U.S.C. (I.R.C. 1954) §§ 7441, 7443 (1970).

²¹ In re *Ross*, 14 U.S. at 464-65 and 489.

²² *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932).

²³ See *Glidden v. Zdanok*, 370 U.S. at 549.

²⁴ *Cf. Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

²⁵ See P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 397 (2d ed. 1973).

²⁶ *Turner v. Williams*, 194 U.S. 279 (1904); *Zakonaite v. Wolf*, 226 U.S. 272 (1912).

²⁷ *Morongahela Bridge Co. v. United States*, 216 U.S. 177 (1910).

²⁸ *Arver v. United States*, 245 U.S. 366 (1918).

²⁹ *Shields v. Utah Idaho Central P.R.*, 305 U.S. 177 (1938); *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943).

³⁰ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

³¹ *Supra* note 29.

³² *Id.* at 168.

³³ 285 U.S. 22 (1932).

³⁴ *Id.* at 54. The court held further, however, that there are due process limitations on the extent to which fact-finding by administrative agencies may be made statutorily conclusive. It reserved to the courts the power to make such factual findings as are necessary to determine whether the claim for compensation falls within the purview of the statute, in order to assure the "appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions" on legislative power. *Id.* at 56.

of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. . . .³⁵

(2) Subordinate Officers of the Article III Courts

The jurisdiction exercised by United States magistrates is not that of a separate article I tribunal. Rather, "the jurisdiction exercised by the magistrate is the jurisdiction of the [article III district] court itself."³⁶ The district judges directly control the range of duties and responsibilities of the magistrates, as well as the procedures to be followed by the magistrates.³⁷

The article III federal courts have traditionally assigned a portion of their judicial power to subordinate officers, such as special masters, referees in bankruptcy, trial commissioners, assessors, United States commissioners, and auditors. This authority to delegate duties—without providing for de novo factual review—has its origin deep in English equity practice and has been generally accepted as inherent in the court. Delegation of a wide range of functions is sanctioned by two hundred years of American practice and, in specific circumstances, by the Federal Rules of Civil Procedure.³⁸ The United States Court of Claims, too, has delegated virtually its entire trial responsibility to trial commissioners, who are not constitutional judicial officers.³⁹

In *Ex Parte Peterson*, the Supreme Court noted that—

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power included authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.⁴⁰

In bankruptcy matters the article III district court serves as the bankruptcy court, even though the Congress might have established a system of separate article I courts.⁴¹ Bankruptcy cases, however, are generally referred automatically to a referee in a bankruptcy, who adjudicates most matters with finality, subject only to review by a district judge using the traditional "clearly erroneous" appellate standard.⁴²

Cases within the original jurisdiction of the Supreme Court itself, moreover, are routinely referred to masters to conduct all necessary hearings and to report findings of fact and conclusions of law to the justices.⁴³

Even though the inherent right of a federal trial court to delegate judicial functions to subordinate officers under its supervision is well recognized in the decisional law, the right is immeasurably enhanced when exercised pursuant to an express grant of authority by the Congress to the subordinate officers in issue. Since the Congress generally has plenary power to regulate the jurisdiction of the federal courts and to specify the modes by which the federal judicial power will be exercised, a delegation of judicial functions made pursuant to an express statutory provision, rather than a general historical inherent power, is substantially more likely to withstand attack.⁴⁴

D. Summary—A Balance of Interests

The extent decisional law does not establish clear guidelines that enable one to detect a firm line dividing exclusive article III functions from non-article III

³⁵ *Id.* at 53, quoting the *Genesee Chief*, 53 U.S. (12 How.) 443, 459-60 (1851).

³⁶ H.R. Rep. No. 1629, 90th Cong., 2d Sess. 19 (1968). "When a case is tried before a magistrate, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate." Proposals to Reform the United States Commissioner System: Hearings on S. 3475 and S. 945 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 256 (1966-1967) (staff memorandum) [Hereinafter cited as Senate Hearings (1966)].

³⁷ 28 U.S.C. § 636(b). Senate Hearings (1966) at 252.

³⁸ Rule 53, Fed. R. Civ. P. See Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452 (1958); Comment, An Indicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584, 588-92 (1973).

³⁹ 28 U.S.C. § 2503; Ct. Cl. R. 13.

⁴⁰ 253 U.S. 300, 312 (1920). But see *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), dealing with limitations on the appointment of special masters. Accord, *T.P.O., Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972).

⁴¹ 11 U.S.C. §§ 1(10), 11(a). See also Silberman, Masters and Magistrates, Part II: The American Analogue, 550 N.Y.U.L. Rev. 1297, 1312 (1975). [Hereinafter, Silberman]

⁴² R. Bank R.P. 810.

⁴³ See, e.g., *Arizona v. California*, 373 U.S. 546 (1963).

⁴⁴ *Cf. Wingo v. Wedding*, 418 U.S. 4161 (1974); *Mathews v. Weber*, 423 U.S. 261 (1976). See also the concurring opinion of Justice Clark in *Glidden Co. v. Zdanok*, 370 U.S. 585-89.

functions.⁴⁵ Rather, the courts have on a case-by-case basis balanced the competing factors at hand within the context of the specific litigation before them. As the Supreme Court stated in *Glidden v. Zdanok*,⁴⁶ and re-emphasized in *Palmore v. United States*—

The same confluence of practical considerations that dictated the result in [*American Ins. Co. v. Canter*, supra] has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure.⁴⁷

A recent article in the New York University Law Review concludes that—

To the extent that article III does impose certain requirements on the judicial process, it would seem to be satisfied by appellate, not initial, determination by such constitutional tribunals. Indeed, the original constitutional scheme, absent any inferior federal judiciary, assured only *appeal* to an article III court. The confirmation of Supreme Court review of state decisions in *Martin v. Hunter's Lessee* requires the conclusion that the judicial process considerations of article III are satisfied by assurance of appeal to an article III tribunal in questions of a federal nature, whatever the nature of the lower tribunal. Furthermore, the extensive and necessary use of the state courts to hear federal questions prior to 1875 and, more recently, the implications of *Testa v. Katt*—which held that state courts may not refuse to enforce claims arising out of federal law, at least where state courts have jurisdiction over similar questions—suggest that the initial disposition of judicial matters may be made by other than an article III tribunal when appeal to such a tribunal is available. Although it might be argued that once Congress has exercised its powers to create article III federal courts, the limitations of that article must then be obeyed, other examples—the Tax Court, the traditional use of masters and *Crowell* itself—call for the conclusion that article III is served, and that litigants' rights in the judicial process are protected, by provision for appeal to an article III court. (footnotes omitted)⁴⁸

The Supreme Court stated in *Palmore v. United States* that—

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Article III court before a judge enjoying lifetime tenure and protection against salary reduction.⁴⁹

E. Conclusion

While it is not possible at this time to point to a clear line of demarcation between clearly permissible delegations of judicial duties and clearly impermissible delegations, one can be confident, based on long-standing and widespread precedent, that non-article III judicial officers may be given an expansive role in performing the federal judicial business—particularly where done so by express statutory authority and under the supervision of article III judges.

Thus, “[t]he demands of article III do not stand inviolate before the compelling practical considerations that move Congress towards furtherance of its legislative goals.”⁵⁰ Accordingly, in the absence of constitutional impediments, attention should be directed to policy concerns and the ability of the parties to mutually consent to alterations in the method of processing their litigation in the district courts.

THE EFFECT OF CONSENT OF THE PARTIES

If a case lies within the subject-matter jurisdiction of a federal court, the parties may, with the approval of the court, waive personal rights or consent to

⁴⁵ There is support in the developing case law and literature for the proposition that absent an art. I basis for jurisdiction, a showing of specialized need, the “ultimate adjudication of indisputably art. III cases and controversies within the art. III courts should rest with the district judges. See *Mathews v. Weber*, 423 U.S. at 270-72; *Gallagher*, An Expanding Civil Role for United States Magistrates, 26 *Amer. Univ. L. Rev.* 66, 81-82 (1976) and citations therein.

⁴⁶ 370 U.S. at 547.

⁴⁷ 411 U.S. at 404.

⁴⁸ *Silberman*, supra note 41, at 1316-17.

⁴⁹ 411 U.S. at 407. The Supreme Court in *Palmore* was concerned with the enforcement of laws in the District of Columbia. Under article I, § 8, cl. 17, Congress is given power “[t]o exercise exclusive Legislation in all Cases whatsoever, over” the District. The narrow holding in *Palmore* is that, under that legislative power, “Congress may provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary.” *Id.* at 390. But the basic argument of *Palmore* and the question to which the grant of the petition for certiorari was limited, was whether a defendant is entitled to be tried by an article III judge in every federal prosecution.

⁵⁰ *Silberman*, supra note 41, at 1315.

variations in the method of processing their litigation, including reference of the case or determination by a non-article III adjudicating officer.⁵¹ The parties, of course, are limited in this regard by the requirement that there be no express statutory provision or substantial public policy prohibiting the procedure.

In *Heckers v. Fowler*,⁵² the parties agreed, after pleadings had been filed, to refer their civil case to a referee "to hear and determine the same and all issues therein with the same powers as the court, and that an order be entered making such reference, and that the report of the referee have the same force and effect as a judgment of the court."⁵³ The Supreme Court rejected an objection to the reference and declared that—

Practice of referring pending actions is coeval with the organization of our judicial system and defendants do not venture the suggestion that the practice is repugnant to any act of Congress. On the contrary, this court held, in the case of the *Alexandria Canal Co. v. Swan*, 5 Howard 89, that a trial by arbitrators, appointed by the court, with the consent of both parties, was one of the modes of prosecuting a suit to judgment, as well established and fully warranted by law as a trial by jury.⁵⁴

Although the parties might have by right proceeded with a full trial in the district court, the Court upheld their waiver of this right and consent to have the case decided by a referee. In *Kimberly v. Arms*,⁵⁵ the Supreme Court upheld the consensual reference of an entire case to a special master and discussed the scope of review by the court.

[The trial court] cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgement the controversy presented, and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court . . . [The master's] findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.⁵⁶

Several significant restrictions have been placed on non-consensual references to special masters in the past century.⁵⁷ The extent to which these limitations, aimed at protecting the litigants and retaining "ultimate adjudication" in the judges of the district court absent special circumstances, are constitutional in scope, or based on policy considerations is unclear.⁵⁸ The limitations on a consensual reference are far less stringent. In *Cruz v. Hauck*⁵⁹ the United States Court of Appeals for the Fifth Circuit stated, with respect to consensual references, that—

We are of the opinion, therefore, that the policy underlying Rule 53 is the alleviation of unnecessary burdens to the litigants and the cornerstone of the rule is the avoidance of delay, costs, and a fact finder other than a judge. We see no reason why the parties to the lawsuit, for whose benefit the restrictions are imposed, may not waive their objections to a reference.⁶⁰

⁵¹ E.g., *Heckers v. Fowler*, 69 U.S. 123 (1864); *Kimberly v. Arms*, 129 U.S. 512 (1889); *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F. 2d 499 (1st Cir. 1975) cert. denied, 423 U.S. 1073 (1976). As discussed previously the federal courts are courts of limited jurisdiction. The parties may not confer subject matter jurisdiction by consent. *Supra* note 5 and accompanying text. *United States v. Griffen*, 303 U.S. 226 (1938).

⁵² 69 U.S. 123 (1864).

⁵³ *Id.* at 127.

⁵⁴ *Id.* at 128-29.

⁵⁵ 129 U.S. 512 (1889). Regarding the scope of review see Gallagher, *An Expanding Role for United States Magistrates*, *supra* note 45; *DeCosta v. CBS, Inc.*, 520 F. 2d 499 (1st Cir. 1975).

⁵⁶ *Kimberly v. Arms*, 129 U.S. at 524.

⁵⁷ See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); Comment, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 789-96 (1975).

⁵⁸ Compare *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F. 2d 499 (1st Cir. 1975); *Cruz v. Hauck*, 515 F. 2d 322, 329-30 (5th Cir. 1975) cert. denied sub nom. *Andrade v. Hauck*, 424 U.S. 917 (1976); *T.P.O., Inc. v. McMillen*, *supra* note 40. *Mathews v. Weber*, 423 U.S. 261 (1973); Silberman, *supra* note 41, at 1314-32, 1349-60.

⁵⁹ *Supra* note 58.

⁶⁰ *Id.* at 330.

In analyzing the development of references in civil cases one author has suggested that United States magistrates can be used extensively, and without any fear of constitutional impropriety, to expedite the civil business of the federal trial courts through the device of consensual references.

There is long-standing precedent for reference, when both parties have consented, of entire civil cases for decision as to both law and fact. A policy encouraging consensual reference under the new magistrate system is both permissible and desirable as a means of reducing congestion in the district courts. Use of the proposed adjudicative powers of federal magistrates would provide a needed middle ground between arbitration and full trial in the district court.⁶¹

The constitutionality of consensual reference of a civil case for adjudication to a magistrate was affirmed recently by the United States Court of Appeals for the First Circuit. In *DeCosta v. Columbia Broadcasting System, Inc.*⁶² the parties had stipulated that certain counts be heard and determined by a magistrate.⁶³ After the magistrate had submitted his findings of fact and conclusions of law, counsel for the defendant objected for the first time that the reference to the magistrate was constitutionally infirm⁶⁴ and void ab initio.⁶⁵ Defendant further argued that even if the reference were constitutional, it violated the "exceptional conditions" requirement of Rule 53.⁶⁶

Both the district court and the court of appeals rejected these arguments, holding that the reference was akin to arbitration and constitutionally valid.⁶⁷ With respect to defendant's constitutional objections, the Court of Appeals declared that—

From a constitutional viewpoint, we can see no significant difference between arbitration and consensual reference for decision to magistrates. In both situations the parties have freely and knowingly agreed to waive their access to an Article III judge in the first instance. Or put another way, they have chosen another forum. Indeed, the decision to waive in the case of a consensual reference is more knowledgeable than in the case of an agreement to arbitrate a future dispute because it is made after the issue has crystallized. Both modes of conflict resolution serve the same goals of relieving scarce judicial resources and of accommodating the parties. If it be queried whether the dignity of article III is being compromised by entering judgments on awards made by non-Article III personnel, the sufficient rejoinder is that judgments are entered on arbitrators' awards.⁶⁸

The Court of Appeals further concluded in *DeCosta* that the reference was not prohibited by the Federal Magistrates Act or by the restrictions of Rule 53 of the Federal Rules of Civil Procedure.

It therefore seems clear to us that the Congressional intent was to leave untouched the tradition, as Congress understood it, that parties could, without violation of Article III freely consent to refer cases to non-Article III officials for decision. We see no suggestion in the committee reports and no reason of policy which would limit consensual reference to "some exceptional conditions" as required by Fed. R. Civ. Pro. 53(b). As we have indicated above, the factors triggering the decision in *La Buy* are not present when the parties knowingly and fully agree to a reference to a magistrate.⁶⁹

There have in fact been instances where the appellate courts have overturned consensual references, although as Professor Silberman has noted, these cases have been exceptional and have generally involved consent to functions that would be illegal.⁷⁰ Judge Kaufman has added—

Of course, where both parties acquiesce to the reference to a master, the permissive scope of the reference is broadened, and, except in those limited instances where the public interest demands initial inquiry by the court, references should be permitted.⁷¹

⁶¹ See Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, *supra* note 38, at 586.

⁶² 383 F. Supp. 326 (D.R.I. 1974), *rev'd* on other grounds, 520 F. 2d 499 (1st Cir. 1975) cert. denied, 423 U.S. 1073 (1976).

⁶³ 520 F. 2d at 504.

⁶⁴ 383 F. Supp. at 327.

⁶⁵ *Id.* at 335.

⁶⁶ *Id.* at 331.

⁶⁷ 383 F. Supp. at 336-337; 520 F. 2d at 503, 505-506, 508.

⁶⁸ 520 F. 2d at 505-6.

⁶⁹ 520 F. 2d at 507.

⁷⁰ See Silberman, *supra* note 41, at 1354 and n. 337; *DeCosta v. CBS, Inc.*, 520 F. 2d at 503-04, nn. 4-6.

⁷¹ Kaufman, *Master in the Federal Courts: Rule 53*, *supra* note 38, at 459.

In criminal cases, where the courts generally tend to be very careful in protecting the rights of the defendant, basic constitutional rights are waived regularly. "When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."⁷² In virtually every instance the Supreme Court has held that the accused may lawfully consent to waive even the most fundamental of these rights, including the right against self-incrimination,⁷³ the right to be free from unreasonable searches,⁷⁴ the right to a Sixth Amendment speedy trial,⁷⁵ the right to a jury trial in a criminal case,⁷⁶ the right to confront and cross-examine witnesses,⁷⁷ the right to counsel,⁷⁸ and the right to be present at each stage of a criminal proceeding.⁷⁹ Perhaps most importantly, the defendant may plead guilty, thereby waiving his right to put the Government to its proof. If accepted by the court, the plea waives the defendant's constitutional rights in almost every respect.⁸⁰

The legislative history of the Federal Magistrates Act supports the proposition that even if due process should require trial of a federal criminal offense (other than a petty offense) by an article III judge in the first instance (even though the *Palmore* case says otherwise), that right to a judge, like any other due process right, may be waived by the parties.⁸¹ Accordingly, where the defendant freely consents to proceed before a duly authorized magistrate pursuant to a statutory procedure, there is no constitutional impediment to such proceeding or to the entry of a judgment by the magistrate in the case.⁸²

JURY TRIALS

The authorization of a non-article III judicial officer to try a criminal or civil case with a jury, vis a vis without a jury, does not raise significant additional constitutional questions—certainly not as long as the parties agree to the procedure. If the parties may consent to having a magistrate or other non-article III officer dispose of their litigation with finality, there is no compelling reason why they may not also consent to having the magistrate try such litigation in front of a jury.

Although the Constitution guarantees trial by jury in most civil and criminal cases,⁸³ the right may be knowingly relinquished or altered by the parties in the same manner as other personal or procedural rights.⁸⁴ In civil cases the Federal Rules provide that a litigant must make an affirmative and timely demand in order to obtain a trial by jury of any issues triable of right by a jury.⁸⁵ Civil litigants in the federal courts, moreover, are encouraged to consent to trial of their cases before a jury of six persons, rather than the traditional twelve.⁸⁶ The parties may also agree that only certain issues in a civil case will be tried by a jury.⁸⁷ With the consent of the parties, the court may order a trial by jury in actions which are not triable of right by a jury,⁸⁸ and the court may in its discretion order a trial by jury of any or all issues even when not actually demanded by a party.⁸⁹

In federal criminal cases the parties may waive their right to trial of the case by a jury.⁹⁰ The defendant, moreover, may choose to plead guilty and give up not only his right to a jury, but his right to a trial itself.⁹¹

⁷² *Schick v. United States*, 195 U.S. 65, 72 (1904) (dissenting opinion).

⁷³ *Garner v. United States*, 424 U.S. 648 (1975).

⁷⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁷⁵ *Barker v. Wingo*, 407 U.S. 514 (1972).

⁷⁶ *Brookhart v. Janis*, 384 U.S. 1 (1966); *Patton v. United States*, 281 U.S. 276 (1930).

⁷⁷ *Brookhart v. Janis*, 384 U.S. 1 (1966).

⁷⁸ *Faretta v. California*, 422 U.S. 806 (1975); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁷⁹ *Cf. Illinois v. Allen*, 397 U.S. 337 (1970); *Diaz v. United States*, 223 U.S. 442 (1912).

⁸⁰ *Tollett v. Henderson*, 411 U.S. 258 (1973); *Parker v. North Carolina*, 397 U.S. 790 (1970).

⁸¹ Senate Hearings (1966) at 246-256.

⁸² *Id.*

⁸³ U.S. Constitution art. III, § 2; amends. VI and VII.

⁸⁴ Generally, a party may waive any right or privilege unless there is a constitutional or statutory provision or fundamental public policy consideration which prohibits him from doing so. See *Schick v. United States*, 195 U.S. 65 (1904) (dissenting opinion).

⁸⁵ Fed. R. Civ. P. 38(b), (d); *General Tire & Rubber Co. v. Watkins*, 331 F. 2d. 192 (4th Cir.), cert. denied, 377 U.S. 952 (1963).

⁸⁶ Fed. R. Civ. P. 48.

⁸⁷ Fed. R. Civ. P. 38(c).

⁸⁸ Fed. R. Civ. P. 39(c).

⁸⁹ Fed. R. Civ. P. 39(b).

⁹⁰ *Patton v. United States*, 281 U.S. 276 (1930).

⁹¹ FED. R. CRIM. P. 11; *Boykin v. Alabama*, 395 U.S. 238 (1969).

Although there are differences in language between the constitutional guarantees to jury trial in civil and criminal cases, the Supreme Court has held that the guarantees are essentially the same.⁹²

The status of the judicial officer who presides at a jury trial has been held to be an integral part of the right to a trial by jury;⁹³ and the powers that have to be conferred upon a judicial officer in order for him to preside over a jury trial which satisfies the requirement of the Seventh Amendment appear to be:

- (1) instructing the jury on the law applicable to the case;
- (2) advising the jury on the evidence presented during the trial; and
- (3) setting aside the jury's verdict if contrary to the law or evidence.

In essence, the presiding officer in a jury trial comporting with the Seventh Amendment must be able to draw all legal conclusions necessary to the determination of the case. The presiding officer must also be able not only to make his own evaluation of the facts, but also to substitute his findings for those of the jury, where appropriate. This authority effectively amounts to the ability to make the ultimate decision in the case if called upon to do so. Thus, the same basic considerations of judicial authority apply here as in the consensual reference of a non-jury case for decision by a person who is not an article III judge.

It is settled that jury trials may be conducted by judges of article I courts,⁹⁴ and by judges of the State courts.⁹⁵ In *Capital Traction Co. v. Hof*,⁹⁶ the Supreme Court held that the Congress could compel civil litigants in certain cases in the District of Columbia to assert their right to trial by jury before a justice of the peace, even though such a jury trial was not found to fully satisfy the guarantee of the Seventh Amendment, as long as the parties retained a right to a complete retrial of the facts before a jury in a higher court of record on appeal. The key considerations to be derived from the case are that the court upheld the power of the Congress to vest a non-article III justice of the peace with the authority to conduct a civil jury trial and to adjudicate the case with finality. The parties' right to a de novo trial was a personal right which they were free to exercise or forego.

S. 1613, the pending magistrate jurisdiction legislation, however, does not provide for a de novo jury trial before a district judge. Rather, it permits the reference of a civil case or a criminal misdemeanor case for jury trial by a magistrate in the first instance only upon the freely given consent of the litigants. Any constitutional objection to jury trial before a magistrate that might be perceived to flow from *Capital Traction* would clearly be cured by the consent of the parties.⁹⁷

As with civil cases, the question of whether a magistrate may be empowered to preside over a jury trial of a federal criminal case is essentially the question of whether the magistrate may be empowered to make the ultimate decision as to guilt or innocence in a case.

The existing criminal trial jurisdiction of United States magistrates was established by the Congress. With the endorsement of the Department of Justice and the Judicial Conference. In the first seven years of the nationwide operation of the system more than half a million petty and minor offense defendants have been handled by United States magistrates (444,000 petty offense defendants and 72,000 minor offense defendants). No serious challenge has yet been raised as to the constitutionality of the Congress vesting magistrates with the power to make

⁹² *Colgrove v. Battin*, 413 U.S. 149 (1973); *Williams v. Florida*, 399 U.S. 78 (1970).

⁹³ "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899).

⁹⁴ *Palmore v. United States*, 411 U.S. 389 (1973).

⁹⁵ *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916).

⁹⁶ See note 93, *supra*.

⁹⁷ The Senate Report on S. 1613 directly addresses this issue:

Additionally, the magistrate would be allowed to conduct jury trials when requested. The bill makes clear that the voluntary consent of the parties is required before any civil actions may be referred to a magistrate. In light of this requirement of consent no witness at the hearings on the bill found any constitutional question that could be raised against the provision. Near unanimity existed among the witnesses on the overall constitutionality of the bill.
Senate Comm. on the Judiciary, The Magistrate Act of 1977, S. Rep. No. 95-344, 95th Cong., 1st Sess. 4 (1977) (Hereinafter cited as Senate Report).

the ultimate determination in these cases.⁹⁸ Trial de novo by a district judge, moreover, is expressly proscribed by the Minor Offense Rules.⁹⁹

The present statute requires a magistrate to personally obtain specific waivers from the defendant of his rights both to trial by a district judge and to whatever right he may have to a trial by a jury before proceeding with the case.¹⁰⁰ Accordingly, the issue of jury trials in criminal cases before non-article III officers has simply never arisen in the federal courts.

Historically, the Congress has authorized jurisdiction over prosecutions under the federal criminal law in the State courts,¹⁰¹ territorial courts,¹⁰² and special and legislative courts.¹⁰³ Unlike the many precedents in civil cases, however, there is little case law on the question of whether a federal criminal case falling within the statutory jurisdiction of the district court may be referred for a hearing or decision to a judicial officer who is not an article III judge. United States commissioners, upon the defendant's consent, were empowered to try certain federal criminal offenses. Their jurisdiction, however, was limited to petty offense cases (which were not generally considered crimes in the Constitutional sense and did not normally give the defendant the right to a jury trial)¹⁰⁴ committed within the boundaries of federal enclaves (areas over which the Congress could exercise special article I authority).

In *Pernell v. Southall Realty*,¹⁰⁵ the Supreme Court discussed the English precedent of trials by jury in minor criminal cases before justices of the peace and noted its belief that such a trial—

... was a jury trial in the full constitutional sense. English justices of the peace were required to be learned in the law. They were judges of record and their courts, courts of record. The procedures they followed differed in no essential manner from that of the higher court of assize held by the King's judges. Trial by jury before the justices of the peace proceeded in the usual manner of a criminal trial by jury in the King's court.¹⁰⁶

The ability of a United States magistrate to make the ultimate determination in a federal misdemeanor case leads to the conclusion that a magistrate could also conduct a jury trial in such a case within his jurisdiction—especially where specifically authorized to do so by the Congress in the exercise of its plenary power to regulate the federal courts and pursuant to the freely given consent of the parties.

POLICY CONSIDERATIONS

The pending magistrate jurisdictional legislation is styled a bill "to improve access to the federal courts." It would accomplish its intended purpose by providing additional flexibility to the courts and to the litigants to dispose of cases expeditiously by using magistrates as an alternative or supplement to trial by district judges—upon the authorization and under the supervision of the district court and subject to the mutual consent of the litigants. The Senate Report on the bill notes that—

The bill recognizes the growing interest in the use of magistrates to improve access to the courts for all groups, especially the less-advantaged. The latter lack the resources to cope with the vicissitudes of adjudication delay and expense. If their civil cases are forced out of court as a result, they lose all their procedural safeguards. This outcome may be more pronounced as the exigencies of the Speedy Trial Act increase the demands on the Federal courts. The imaginative supply of magistrate services can help the system cope and prevent inattention to a mounting queue of civil cases pushed to the back of the docket.¹⁰⁷

⁹⁸ But see statement of Fred M. Vinson, Assistant Attorney General, Senate Hearings (1966) at 107, which was subsequently disavowed by the Department of Justice. See also the memorandum prepared by the staff of the Senate Judiciary Subcommittee, entitled *The Constitutionality of Trial of Minor Offenses by U.S. Magistrates*, Senate Hearings (1966) at 246.

⁹⁹ Fed. R. Min. Off. p. 8(d).

¹⁰⁰ 18 U.S.C. § 3401(b).

¹⁰¹ See *Testa v. Katt*, 330 U.S. 386 (1947); and Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 551-53, 570-72 (1925).

¹⁰² *Palmore v. United States*, 411 U.S. 389 (1973).

¹⁰³ *Toth v. Quarles*, 350 U.S. 11 (1955); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

¹⁰⁴ See Frankfurter & Corcoran, *Petty Federal Offense and the Constitutional Guaranty of Trial by Jury*, 38 Harv. L. Rev. 917 (1926); Doub & Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. Pa. L. Rev. 443, 463-64 (1950); Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697 704-05 (1974).

¹⁰⁵ 416 U.S. 363 (1974).

¹⁰⁶ *Id.* at 381.

¹⁰⁷ Senate Report at 4. See also Judicial Conference of the United States, *Proposed Amendment to the Federal Magistrates Act* (March 7, 1975).

(1) *Judicial Economy*

Recent history teaches clearly that the authorization of sufficient district judgeships by the Congress invariably lags behind the actual needs of the courts. The Judicial Conference noted in its March 1975 report to the Congress in support of its bill to increase the jurisdiction of magistrates that the courts cannot cope with the problem of increasing caseloads merely by continually "increasing the number of district judges and the supporting staffs, . . . with the concomitant need for huge additional physical space."¹⁰⁸ Judge Kaufman made the same points in 1970—

. . . Simply creating more judgeships to cope with increased court business is a long, expensive, frustrating, and often inefficient procedure for reducing court congestion. . . . We do need more judges. But legislatures, sensitive to public displeasure with rising taxes and higher judicial outlays, are going to balk at the millions required to build new courthouses, create more judgeships, and hire the supporting personnel if we attempt to solve all our problems by simply increasing the number of judges. It is like adding more engineers to a railroad still operating with steam instead of diesel engines.¹⁰⁹

The Senate Report on the pending magistrate legislation concurs in these appraisals of the judiciary and argues that—

The bill would allow increased use of magistrates to improve access to justice on a district-by-district basis. More flexibility is also created by the limited tenure of magistrates. Magistrate positions would be selectively placed by the Judicial Conference to accommodate surges of litigation in particular districts at particular times. All this would be accomplished without resort to the process of congressional confirmation.¹¹⁰

The developing literature similarly points to the judicial economies that could be achieved by the encouragement of consensual references to magistrates in appropriate cases.

Use of a system of consensual reference would produce three sorts of benefits. To the extent that the less difficult cases are channelled to the magistrates, district judges will be freed to deal more effectively with the more difficult and important cases. Second, if the magistrates' dockets are kept uncongested, the parties, and society as a whole, will receive the benefits of rapid adjudication and more careful consideration of cases by both tribunals. Third, a magistrate may be hired for one term only, eliminating presently existing congestion without the need to engage tenured judges who may be unnecessary after the congestion has been relieved.¹¹¹

The Federal Magistrates Act "facilitated a rational division of labor among judicial officers in the district court."¹¹² Its intent is to free the time of the district judges to perform the work which only they may do.¹¹³ In this vein, the Senate Report on the pending bill notes that the cost of establishing and maintaining a full-time magistrate position is approximately one-half the cost of establishing and maintaining a district judgeship. Accordingly, "the bill actually will result in a net savings when compared to the costs for the judgeships that would still be needed if magistrates could not exercise the jurisdiction provided in the bill."¹¹⁴

(2) *Supervision by the District Court*

The trial of a non-jury or jury case by a magistrate must be authorized pursuant to local rule of court.¹¹⁵ A magistrate is not a separate court or tribunal, but is an integral part of the district court with no independent jurisdiction of his own.

The magistrate's power to perform judicial functions depends entirely upon his connection with the district court which appoints him and retains the right to control and supervise his conduct at all times. Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consent merely to an alteration in trial procedure, not to a transfer of jurisdiction from the district court to another tribunal. (Citations omitted).¹¹⁶

¹⁰⁸ *Supra* note 2.

¹⁰⁹ Kaufman, *The Judicial Crisis, Court Delay and the Parajudge*, 54 *Judicature* 145, 147-48 (1970).

¹¹⁰ Senate Report at 4.

¹¹¹ Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, *supra* note 38, at 594-95.

¹¹² Senate Report at 3.

¹¹³ Senate Hearings (1966); Chief Justice Burger, *Year-End Report on the Judiciary* (January 1, 1978), p. 2.

¹¹⁴ Senate Report at 15.

¹¹⁵ 28 U.S.C. § 636(b)(4) and S. 1613 § 2.

¹¹⁶ Senate Hearings (1966) at 252.

A magistrate who is believed to be fully competent by his appointing district court, thus, may be used by the court to supplement the output of the judges. Since, however, "the office of magistrate, if misused, also provides an opportunity for judges, consciously or unconsciously, to shirk their duty,"¹¹⁷ fear of abdication of judicial responsibilities by the district judges may exist.¹¹⁸ It has been suggested, though, that—

An innovative enterprise always entails certain risks and the office of federal magistrate is no exception. The risks in this instance are certainly justifiable. The factor on which their outcome depends is the degree to which judges meet their responsibility in selecting and supervising magistrates. In light of the serious responsibilities with which district judges are already entrusted, and the opportunities for effectiveness and efficiency that the Act makes possible, the development of the office of magistrate is not only justifiable, but also represents an intelligent choice and an interesting innovation in federal practice.¹¹⁹

Further, there are several checks which may be imposed upon the overutilization or improper utilization of a magistrate, including the limits on the available time of the magistrate himself, the requirement that trial duties be delegated in accordance with the wishes of the district court as a whole and the provisions of local rule, the corrective authority of the court of appeals or the circuit council, expressions of discontent or concern by the bar, and the express requirement that litigants must consent to trial by the magistrate in each case.

(3) *Greater Access for the Parties*

Consensual references of cases to a magistrate for trial give the parties greater flexibility and opportunity to dispose of their dispute promptly.¹²⁰ There are several reasons why civil litigants might choose to consent to trial by a magistrate. They may in appropriate cases seek a competent and speedy resolution of the facts of their dispute by a disinterested third party, whether magistrate or judge. They may be close to settlement and need only an early trial date to dispose of their case. They may have particular confidence in the magistrate; or they may wish to have the magistrate conduct the trial of the case because he has already familiarized himself with the litigation through supervision of the pretrial and discovery proceedings. In any event, the parties would perceive the trial of their case by the magistrate as an effective, prompt, and acceptable resolution of their case, in preference to an out-of-court settlement, arbitration, or eventual trial by a district judge. The wishes of the parties to the litigation—as long as approved by the court—should be given considerable weight.

The authorization of the trial of jury cases, as well as non-jury cases, by magistrates increases the range of options available to the parties. They may wish in certain instances to relinquish only one right (that of trial by a district judge), rather than two rights (trial by the judge and by a jury). In fact, one of the witnesses who testified at the Senate hearings on the pending legislation stated that based on his experience there were many cases which went to a district judge rather than a magistrate only because the defendant had insisted on his right to a trial before a jury.¹²¹

The Senate Judiciary Committee recognized this possibility and stated in its report on S. 1613—

"The bill, however, also provides that a magistrate may be empowered to try such cases with a jury. This new provision should encourage an even broader use of magistrates in the trial of misdemeanors where the defendant

¹¹⁷ Gallagher, *An Expanding Civil Role for United States Magistrates*, *supra* note 45, at 107.

¹¹⁸ See *Mathews v. Weber*, 423 U.S. 261 (1976); *T.P.O., Inc. v. McMillen*, 460 F. 2d. 348 (7th Cir. 1962).

¹¹⁹ Gallagher, *An Expanding Role for United States Magistrates*, *supra* note 45 at 107-08. See also Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, *supra* note 38, at 593.

¹²⁰ The First Circuit Court of Appeals has stated, "Indeed, on occasion perhaps when the legal issue is closely balanced and the stakes are not high, or when expedition and expense are dominating factors, parties may prefer prompt decision, though by a magistrate, to decision by a judge. This avenue ought not to be barred."

DeCosta v. CBS, Inc., 520 F. 2d at 507.

¹²¹ Hearings on S. 1612 and S. 1613, the Magistrate Act of 1977, Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. 218 (1977) (Testimony of Arthur L. Burnett) [Hereinafter cited as Senate Hearings (1977)].

is willing to be tried before a magistrate, but wishes to also avail himself of the right to trial by jury.¹²²

(4) Summary

The availability of sufficient judicial resources—judges and magistrates—to handle the caseload within a given district court is the primary factor that must be considered by the court in determining whether its magistrates should be empowered to try cases upon the consent of the parties. In some districts, for example, the heavy workload of the district judges coupled with the time constraints of the Speedy Trial Act of 1974, have virtually precluded the judges from trying civil cases. In other districts, the civil caseload may be under control. The Administration bill, S. 1613, recognizes the variety among the several district courts by providing a permissive grant of trial jurisdiction to magistrates, rather than a mandatory one. Thus, in each district, the judges of the court retain the discretion of referring cases to magistrates in order to provide the most appropriate division of judicial responsibilities among the officers of the court.

There is a movement among those concerned with effective judicial administration to develop new methods for disposing of civil cases and criminal litigation which will reduce the delays and the costs presently attendant in the processing of cases—consistent, of course, with quality justice and constitutional requirements. The opportunity for litigants to consent to jury and non-jury trials before United States magistrates, or other subordinate judicial officers, in appropriate cases is consistent with that goal. It also enables the courts to cope more readily with the vagaries of fluctuating caseloads, and is fully consistent with the American Bar Association's 1974 Standards Relating to Court Organization:

There is a wide range of functions that judicial officers can perform. These include conducting preliminary and interlocutory hearings in criminal and civil cases, presiding over disputed discovery proceedings, receiving testimony as a referee or master, hearing short causes and motions, *and sitting in lieu of judges by stipulation* or in emergency. . . . This arrangement economizes the time of the regular judges and recognizes the fact that smaller civil and criminal cases ordinarily require different legal skills, experience, and authority, particularly the capacity to function fairly and efficiently in handling large volumes of cases. At the same time, it brings the trial of smaller cases within the ambit of the principal trial court and makes them subject to the supervision of its judiciary. . . . (Italic supplied)¹²³

APPEALS

United States magistrates, and United States commissioners before them, have been given statutory authority to try persons accused of, and sentence persons convicted of, certain federal criminal offenses in the district court.¹²⁴ The "judgment of conviction" by a magistrate is of itself a final judgment by a judicial officer of the district court, and it has the same effect that a judgment ordered by a district judge would have in the same case.

Under current law an appeal from a judgment of conviction by a magistrate in a criminal case is taken to a judge of the district court.¹²⁵ The scope of review by the district judge is the same as that on appeal from a judgment of the district court to the court of appeals.¹²⁶ The pending legislation would make no changes in the system of appeals in criminal cases.

In civil cases, there is no explicit provision in current statute or rule which governs appeals from a magistrate's decision in a case which he has tried with the consent of the litigants.¹²⁷ The practice among the circuits varies, as appeals have been taken both to a district judge and directly to the court of appeals.¹²⁸ Moreover, the available case law is very sketchy on the point. The United States Court of Appeals for the Eighth Circuit, for example, has ruled that a magistrate's judgment and supporting papers, even in a consent case, must be treated only as a recommendation to the district judge.¹²⁹ The court was concerned *sua*

¹²² Senate Report at 6.

¹²³ American Bar Association, Standards Relating to Court Organization (1974), § 1.12.

¹²⁴ 18 U.S.C. § 3401 (1970).

¹²⁵ 18 U.S.C. § 3402 (1970).

¹²⁶ Fed. R. Min. Off. P. 8(d).

¹²⁷ 28 U.S.C. § 636(b), however, does provide specifically for review of pretrial matters handled by a magistrate, and Rule 53 governs the review of special master reports.

¹²⁸ Senate Hearings (1977) at 196.

¹²⁹ *Reciprocal Exchange v. Noland*, 542 F. 2d 462 (8th Cir. 1976).

sponte with the basis for its own jurisdiction in the case before it in the absence of statutory authority, and it did not discuss constitutional issues in any depth. Nevertheless, it indicated that a judge might constitutionally have to order the judgment of the district court.¹³⁰

The Eighth Circuit decision would require some action or review by a judge before entry of judgment, but it does not actually specify the extent of the review which the judge must give to the matter. The scope of review was in fact discussed in *DeCosta v. CBS*.¹³¹ The district court there had applied the "manifest error" standard of *Kimberly v. Arms*.¹³² The court of appeals, however, found that that standard "lacked content," at least as to legal issues, and in the absence of statutory guidance it decided to apply the standards of Rule 53 governing the review of special master reports. The court of appeals implied, in discussing the various standards of judicial review, that the very limited review given to arbitration awards might also be appropriate.¹³³

Without specific statutory authority, the consent of the parties alone would not appear sufficient to permit a district judge to delegate his power to "ultimately adjudicate" a case filed in the court, for appellate courts have upon occasion vacated consensual references.¹³⁴ Even the early landmark consensual reference cases as *Kimberly*, contemplate some minimal judicial review, at least for "manifest error."¹³⁵

In *Steger v. Orth*,¹³⁶ the parties consented to the reference of an entire case to a referee to hear and determine all issues. Judgment was entered by the clerk of the district court upon the referee's report, with the knowledge of the parties. When the defendant later objected to review of the case by the court of appeals on the grounds that the judgment had not been entered upon order of a district judge, the United States Court of Appeals for the Second Circuit held that the entry of the judgment by the clerk of court, without action by a judge, was harmless error, as entry of the judgment was *pro forma* in the circumstances of the case.¹³⁷

In the same vein, Rule 55(b) (1) of the Federal Rules of Civil Procedure authorizes the clerk of the district court to enter final judgment by default upon motion of the plaintiff. No action is required or contemplated by a judge of the district court.

The specific question of whether the Congress may by legislation settle any jurisdictional questions and permit a magistrate to order entry of the final judgment of the district court in a civil case has not been discussed in the pertinent case law. The Congress has in fact provided that federal question cases proceed in state, territorial and legislative courts and in administrative agencies with finality, with a right to only a record appeal to an article III court. Some authors, moreover, have argued that there is no violation of article III as long as appellate review alone is provided to a constitutional court.¹³⁸ This appears particularly true where there is mutual consent by the parties.¹³⁹

While the decisional law does not adequately address the question, the Congress has plenary power to shape the structure and jurisdiction of the federal courts and could give finality to the judgment of a magistrate in a civil case, and permit that judgment to be appealed to a higher court. This is particularly so where the statutory procedure would require the consent of all the parties to such action. As the Senate Report points out—

In light of this requirement of consent, no witness at the hearings on the bill found any constitutional question that could be raised against the provision. Near unanimity existed among the witnesses on the overall constitutionality of the bill.¹⁴⁰

Moreover, the pending legislation would permit the reference of a civil case to a magistrate only upon the designation of the district court, "and under such conditions as may be imposed by the terms of such designation."¹⁴¹ Under the

¹³⁰ *Id.* at 463.

¹³¹ *DeCosta v. CBS, Inc.*, 520 F. 2d 499 (1st Cir. 1975).

¹³² 383 F. Supp. at 337, citing *Kimberly v. Arms*, 129 U.S. 512 (1889); See Also Silberman, *supra* note 41, at 1354-58.

¹³³ *DeCosta v. CBS, Inc.*, 520 F. 2d at 508.

¹³⁴ *Silberman*, *supra* note 41, at 1354, no. 337.

¹³⁵ *Kimberly v. Arms*, 129 U.S. at 524.

¹³⁶ 258 F. 619 (2d Cir.), cert. denied, 250 U.S. 663 (1919).

¹³⁷ *Id.*

¹³⁸ *Silberman*, *supra* note 41, at 1316-18.

¹³⁹ *Id.* at 1350-58.

¹⁴⁰ Senate Report at 4.

¹⁴¹ S. 1613 § 2.

totality of the circumstances—the great deference accorded to the plenary power of the Congress, the freely given consent of the parties, and the requirement for control and supervision by the district judge—it appears that the Congress could permit the entry of a final judgment of the district court following trial before a magistrate without requiring review by a district judge, as long as the parties retained their right to appeal to an article III judge or court.¹⁴² Accordingly, the question of direct appeal to the courts of appeals is more one of policy than constitutionality.

As a matter of policy, a wide difference of opinion has surfaced regarding the appropriate forum for the appeal to be taken from a magistrate's decision following his trial of a civil case. The Attorney General recommends that all appeals be to a judge of the district court, with only limited, certiorari-type review thereafter by the court of appeals.¹⁴³ Most of the witnesses who testified at the Senate hearings on the bill, on the other hand, favored direct appeal from the magistrate's judgment to the court of appeals, on the grounds that the parties would not consent to trial by a magistrate if they were required thereby to relinquish their right to automatically appeal to the court of appeals.

The Senate attempted to reconcile these competing views by providing alternative appellate routes. The bill stipulates that the appeal from a magistrate's judgment will normally be taken to a district judge. The parties, however, may mutually consent to have the judgment of the district court entered on the magistrate's order, with direct appeal to the court of appeal.

(a) *Review by a district judge* is said to have the advantage in appropriate cases of reducing the costs of litigating the appeal, by eliminating the costly printing of briefs, travel costs to the nearest seat of the court of appeals, and the cost of reproducing the entire record of the trial for the appellate court. Consideration of the appeal initially by a single judge, rather than by a panel of three judges, might be more economical of overall judicial time, at least in lengthy cases. A subsequent certiorari-type review to the court of appeals would give the circuit judges the power to refuse to hear appeals and enable them to concentrate their efforts on the more meritorious appeals and the more difficult cases. Proponents of appeal to a district judge contend that it would help to relieve the caseload burdens of the courts of appeals, which are currently facing a workload crisis. Since the magistrate is a subordinate officer of the district court, all actions of the magistrate should be routed through his superiors. Finally, it is suggested that an appeal could be decided more speedily by a single, local district judge than by a panel of three circuit judges, who may not be able to reach the matter on their calendar for months, or even years.

(b) *Direct appeal to the court of appeals* has the advantage of providing a single procedure for the trial and appeal of all civil cases in the district court. Since the magistrate by stipulation sits in the place of a judge, the appeal from his decision should be the same as if the judge himself had tried the case. Many of the witnesses at the hearings spoke in favor of direct appeal. The district judges expressed the view that they would not be inclined to refer cases for trial by a magistrate if they would have to ultimately review the case themselves.¹⁴⁵ The private attorneys asserted that they would not advise their clients to consent to trial before magistrates if their right of a full, automatic appeal to the court of appeals were to be limited.¹⁴⁶

Direct appeal would also obviate any possibility of adding an extra layer of litigation and expense to the process—referred to at the hearings as “fourth-tierism.”¹⁴⁷ It would answer the argument which has been raised at the hearings that the parties might not have as much confidence in an appeal from a subordi-

¹⁴² Some doubts have been raised as to whether a district court judgment may be entered in a civil case without some review and “ultimate adjudication” by a district judge. See note 45. It would appear that Congress could sanction the review of a magistrate's decision by the U.S. Court of Appeals, whether or not the magistrate's judgment can be considered the judgment of the district court itself. The conference may wish to suggest a modification of the pending legislation to clarify that an appeal would be based on the magistrate's decision, rather than a final district court judgment, if it concludes that this is necessary to satisfy the constitutional requirements of article III.

¹⁴³ Senate Hearings (1977), at 152–53.

¹⁴⁴ Id. at 9–10 (Judge Metzner), 85–86 (Mr. Barnes), 93 (Judge Skopil), 183 (Ms. Silberman), 196 (Mr. Frank), 222 (Mr. Burnett).

¹⁴⁵ Id. at 80–81, 85–86 (Judge Lord), 96 (Judge Skopil), 115, 126 (Judge Sear).

¹⁴⁶ Id. at 100–101 (Mr. Evans), 157–58 (Senator DeConcini, summarizing previous testimony). See also id. at 10, 75–76 (Judge Metzner), 229 (Judge Ross). But see id. at 85 (Mr. Barnes).

¹⁴⁷ Id. at 195–96 (testimony of Mr. Frank).

nate officer to the individual who has selected him as they would have in a direct appeal to a higher court.¹⁴⁸ It should also be noted that the district courts are trial courts and should not generally be given appellate jurisdiction. Finally, direct appeal to the court of appeals would not add any additional burdens to the courts of appeals, since the magistrate sits in lieu of a judge. The district judge would have to try the case in any event if the parties had not consented to trial by the magistrate.

(c) *The alternate appeal option* approved by the Senate allows the greatest greatest flexibility. While it does not provide a single, fixed appellate procedure, it should encourage the parties to consent in the greatest number of cases. In routine cases, for example, the parties may wish a quick and inexpensive appeal to a local district judge, while in complex cases or cases involving significant questions of law, the attorneys may wish to preserve their full right to appeal to the court of appeals without adding an extra layer of litigation.

The alternate appeal system permits the parties and the court to fashion the most appropriate procedure for each individual court. It also has the advantage of offering a practical compromise between the various competing views which have been expressed.

¹⁴⁸ Id. at 85 (Judge Lord), 93 (Judge Skopil), 107 (Mr. Levin), 183 (Ms. Silberman), 229 (Judge Ross).

APPENDIX VI—MISCELLANEOUS CORRESPONDENCE

(a)

AMERICAN CIVIL LIBERTIES UNION,
Washington, D.C., January 23, 1978.

HON. ROBERT W. KASTENMEIER,
*Chairman, Subcommittee on Courts, Civil Liberties and the Administration of
Justice, Rayburn House Office Building, Washington, D.C.*

DEAR REPRESENTATIVE KASTENMEIER: As you know from testimony presented to the Subcommittee on September 27, the American Civil Liberties Union has opposed the enactment of S. 1613 or any other bill which would enlarge the jurisdiction of federal magistrates. We did suggest several changes to S. 1613, however, in the event that the Subcommittee voted to report the bill.

We understand that the Subcommittee has approved some amendments to S. 1613 and will be considering others when it resumes markup tomorrow. We are writing to advise you that the ACLU will withdraw its opposition to the bill if it is amended in a manner which addresses the concerns expressed in our testimony.

Specifically, we endorse the amendment which serves to delete the language in Sec. 2(c)(1) providing that the designation shall be "under such conditions as may be imposed by the terms of such designation." As the explanation notes, this is designed to prevent the assignment of categories of cases to magistrates. (We assume that that part of the amendment which provides that "when there is no such concurrence, then by the Chief Judge," is intended to allow the Chief Judge to cast a tie-breaking vote. The explanation of the amendment should make it clear that this phrase does not give the Chief Judge veto power over the other judges.)

We also endorse the amendment which adds a new subsection to insure that the district judge will not be made aware of which party or parties to a civil case withheld consent to trial before the magistrate.

Because we do not believe that civil litigants who agree to go before a magistrate should have to give up their right to court of appeals review and because the Subcommittee has approved a mechanism for appeal to the district court, the withdrawal of our opposition to the bill is contingent upon further Subcommittee action guaranteeing an alternative appeal procedure to the circuit court.

Unlike circuit court judges, district court judges are not selected on the basis of a perceived ability to perform appellate functions. In addition, circuit court review, by definition, provides a broader perspective than does review by the district judge. There is also the practical aspect, noted in the Senate Report, that "attorneys would not advise their clients to consent to trial before a magistrate if such consent would mean . . . limiting the clients' rights to take an appeal to the circuit court." At 5.

Finally, for the reasons stated in our testimony, the withdrawal of our opposition to S. 1613 is further contingent upon amendments (1) providing for the merit selection of magistrates, through the establishment of nominating panels (whose members are appointed by other than the district judges); and (2) retaining the existing requirement that a person charged with a petty offense must consent to trial before a magistrate. The latter is particularly important since the lack of a consent requirement for petty offenders raises serious constitutional questions. As the Subcommittee has noted in explaining the amendment dealing with consent in civil cases, "Nobody opposes the amendment, and indeed, *it may be constitutionally mandated.*" (Emphasis added.)

We wish to thank you again for the opportunity to testify on S. 1613 and for your consideration of our suggested changes to the bill.

Sincerely,

PAMELA S. HOROWITZ,
Legislative Counsel.

(b)

AMERICAN JUDICATURE SOCIETY,
Chicago, Ill., April 14, 1978.

HON. PETER W. RODINO, JR.,
Rayburn House Building,
Washington, D.C.

DEAR MR. RODINO: On behalf of the American Judicature Society, I am pleased to enclose a copy of a resolution relating to the Magistrate Act of 1978 (S. 1613) now before the House Judiciary Committee. The resolution was passed by the Society's Board of Directors at its recent meeting in New Orleans.

I am confident that you and your colleagues of the Judiciary Committee will give careful consideration to the position of the Society as expressed in this statement.

Sincerely yours,

FLETCHER G. RUSH,
President.

Enclosure.

AMERICAN JUDICATURE SOCIETY, BOARD OF DIRECTORS' MEETING, FEBRUARY 11, 1978,
NEW ORLEANS, LA.

THE MAGISTRATE ACT OF 1978

Resolution

Be it resolved that: although the American Judicature Society commends the efforts of the Department of Justice in exploring the further utilization of magistrates, in view of the imminent enactment of the Omnibus Judgeship Bill by the Congress which will increase very substantially the number of United States district judges, and in view of the pending legislation in the Congress that would materially change the diversity jurisdiction for suits in the United States and if enacted would result in a substantial reduction in the number of suits filed based on diversity jurisdiction, the American Judicature Society believes that further consideration by the Congress of the pending Magistrate Act of 1978 should be deferred until such time as there has been a reasonable opportunity to determine the need or extent of the need for the pending magistrate legislation.

Be it further resolved that: if such magistrate legislation is determined to be needed in the future, the Congress should give further consideration to provisions in such legislation dealing with the appointing power and with the merit selection, tenure and removal of such magistrates.

(c)

SHIPMAN & GOODWIN,
COUNSELORS AT LAW,
Hartford, Conn., May 26, 1978.

HON. WILLIAM R. COTTER,
U.S. House of Representatives, Rayburn House Office Building,
Washington, D.C.

DEAR REPRESENTATIVE COTTER: I would urge your support of H.R. 7463 (S. 1613) which will broaden the civil and criminal jurisdiction of United States Magistrates.

All courts, state and federal, are having a very difficult time in handling both the civil and criminal dockets for a variety of reasons. But the federal court, with broader functions assigned to the Magistrate, is in a unique position to break the log-jam. The Speedy Trial Act has placed severe limitations on the civil business and Connecticut lawyers are now returning civil writs, properly returnable to federal court, to the state courts hoping for an earlier trial date. I believe that the option of a jury trial before a Magistrate, with the consent of the parties, is a potential benefit which should be seized upon. Increased jurisdiction over criminal matters to all misdemeanors committed in the district, including trial by jury, should also have a beneficial result in easing the burden of the trial judge. I also note in passing the Second Circuit Court of Appeals decision in *Sick v. City of Buffalo* (April 5, 1978) which assumes that trial by

jury, before a magistrate, with the parties' consent, is proper. The significance of that decision is that H.R. 7463 will clarify the assuming power and is not as radical a break-through as some may imagine.

To place my request in perspective, I should indicate that I have had considerable contact with the federal court system. I served as law clerk to the Honorable William H. Timbers (1962-1963) and as Chief Federal Public Defender (1972-1975).

Respectfully yours,

THOMAS D. CLIFFORD.

(d)

U.S. DISTRICT COURT,
FOR THE DISTRICT OF MARYLAND,
Baltimore, Md., June 1, 1978.

Hon. ROBERT W. KASTENMEIER,
Chairman, House Judiciary Subcommittee on Courts, Civil Liberties, and Administration of Justice, Rayburn House Office Building, Washington, D.C.
Re: Senate Bill 1613.

DEAR CONGRESSMAN KASTENMEIER: It is my understanding that your House Subcommittee now has pending before it Senate Bill 1613, relating to United States Magistrates. There is one aspect of the amendments, which I understand were originally proposed by your Subcommittee to the Senate Bill, about which I wish to comment.

As I understand it, your Subcommittee has proposed, in effect, to delete that part of the Senate Bill, Section 7, which would have given the United States Magistrates exclusive jurisdiction over the trial of petty offenses and would have precluded the defendant from demanding a trial before a Judge of the District Court. I can understand your concern with preserving rights to a jury trial in certain types of cases which may have led to your Subcommittee's decision.

I wish to point out to you, however, that there are a number of districts, including the District of Maryland, in which there are a great number of federal installations generating tremendous numbers of traffic cases and parking tickets. Under the present system, any person who obtains a parking ticket on a federal reservation or installation is entitled to be tried in the United States District Court by a District Judge. If, for instance, labor unrest among the members of unions representing federal employees on a particular installation were to lead to suggestions by union leaders that every person with a parking ticket demand a trial in the Federal District Court, the business of our court would come to a halt.

The total number of traffic tickets, I am advised, which were processed by the Central Violation Bureau for our District in the fiscal year 1977 was 58,548. Of those cases, 92 were referred to the District Court for trial after a defendant refused to consent to trial before the Magistrate. Of that number, only six were actually tried to a verdict or finding in the District Court, the balance having been disposed of by dismissals, guilty pleas, and changes of mind by the defendant resulting in the case being returned to the Magistrate.

In this District, we have noticed in the last year increasing numbers of individuals demanding that their traffic tickets and parking tickets be tried in the Federal District Court. Apparently this is a ploy to obtain additional time or, in some cases, to undermine the system.

I hope that your Subcommittee sees fit to recommend at least that magistrates be given exclusive jurisdiction over parking tickets on federal reservations or installations. Appeals by a convicted defendant to the United States District Court would serve to vindicate any legitimate interest that an individual would have, under those circumstances, in having his case heard by a Judge of the District Court in the first instance.

Very truly yours,

JAMES R. MILLER, Jr.,
U.S. District Judge.

(e)

GROSS, HYDE, & WILLIAMS,
ATTORNEYS AT LAW,
Hartford, Conn., June 2, 1978.

Hon. WILLIAM R. COTTER,
U.S. House of Representatives, Rayburn House Office Building,
Washington, D.C.

Re: House of Representatives Bill No 7463 Senate Bill No. 1613 Concerning
U.S. Magistrates

DEAR CONGRESSMAN COTTER: I am writing you concerning House of Representatives Bill No. 7463 and its counterpart Senate Bill No. 1613 which would broaden the civil and criminal jurisdiction of United States Magistrates.

I sincerely urge that you give this legislation serious consideration as I support its passage.

First, I would like to address myself to that part of the bill which would expand the U.S. Magistrates' authority to try all Federal misdemeanors and defendants charged with petty offenses without allowing a defendant to elect a trial before a Federal District Court Judge. As a Federal Public Defender for approximately three years (Chief from March 1976 throughout November 1976), I was able to observe the criminal justice system in our Federal Courts in Connecticut on a daily basis. While the majority of indictments which are presented in our Federal Courts involve felonies, there are always a number of charges presented which are misdemeanors and/or petty offenses. It is my opinion that having these cases tried before our magistrates is both an efficient and fair manner with which to dispose of these cases. Our District Court Judges are frightfully busy and burdened with extraordinarily demanding and complicated cases. Moreover, it has been my experience that our Magistrates are well-trained and more capable of handling such cases.

The few times in which I represented persons charged with misdemeanors I attempted to convince my clients to try the case before a magistrate; however, my clients always were reluctant and would not agree to a trial presided over by a Magistrate because they believed that the fact that they were given an option means that selecting a Magistrate would be clearly a choice for an inferior trial or why else would Congress be permitting such a choice. Because of the Speedy Trial Act, we no longer have the problem of stale and delayed trials in our Federal Courts. On the other hand, having to dispose of criminal cases in such a short time has created a larger backlog and delay of our civil cases. By not allowing a defendant to elect between a Magistrate and a District Court Judge, at least, these criminal cases would not have to occupy our Federal Judges.

I am firmly convinced through my experience and personal acquaintance with the Magistrates we have in Connecticut and some of those I have met from other jurisdictions, that the defendants would not be subject to any less of a trial than they would receive before a Federal District Court Judge. I realize that a number of civic groups have raised the question whether our Magistrates are competent to handle such cases. It is my opinion that if the defense attorneys who practice in Federal Court were polled on this issue, they would overwhelmingly be in favor of having our Magistrate try these misdemeanors and petty cases.

Secondly, as to the expansion of the U.S. Magistrates' authority to conduct civil jury and non-jury trials without limitation on the amount of damages, I submit that the mere backlog and delays we are experiencing in our Federal Courts demands the passage of this bill. Additionally, I believe the parties are well protected because an appeal may be taken by an aggrieved party to the District Court in the same manner as an appeal from a judgment of the District Court to the Court of Appeals. In the decision of *Sick v. City of Buffalo, et al*, decided by the Second Circuit Court of Appeals on April 5, 1975, I agree with Judge Oakes where he states:

"District Court review after a trial before a magistrate or master is not a meaningless exercise. Rather the procedure comports with a fundamental Congressional policy underlying the Magistrate's Act—to aid the Courts in their ultimate decision-making function. Subjecting the act of magistrates and masters to District Court scrutiny also avoids possible constitutional infirmities." (footnotes omitted)

In summary, I urge that you pass this bill as it will be a big help to our Federal Judges, our Court personnel, defendants, and civil parties alike. Should you have any questions or should you like more specific information, please do not hesitate to contact me.

My regards,

CHARLES N. STURTEVANT, III.

(f)

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
San Diego, Calif., June 2, 1978.

Re Magistrate Act, S. 1613.

HON. PETER W. RODINO,
Chairman, House Committee of Judiciary,
House Office Building, Washington, D.C.

DEAR CONGRESSMAN RODINO: I am President of the Ninth Circuit District Judges Association. At a meeting of our Association held May 17, 1978, our members requested that I write to you to express our view concerning pending legislation which would increase and clarify the jurisdiction of United States Magistrates.

We very much appreciate the present consideration by the Congress of the Magistrate Act (S. 1613). As you are well aware, the civil and criminal caseload of the district courts continues to expand. Recent legislation, such as the Speedy Trial Act, makes it necessary for the courts to utilize innovative techniques of judicial administration. Only through the development of efficient case management procedures will the federal trial courts continue to be able to afford the public prompt and just resolution of disputes.

Many of us have found that increased use of magistrates results in significant benefits to the courts and to the public. Magistrates have saved countless hours of time for district judges by deciding "non-dispositive" motions (28 U.S.C. § 636(b)(1)(A)), making findings and recommendations on "dispositive" motions (28 U.S.C. § 636(b)(1)(B)), and performing the other important functions presently authorized by law. The work of the magistrates has been of uniformly high quality. We believe that S. 1613, if promptly enacted, will help district judges and magistrates to continue the progress we have made.

With the hope of assisting the Congress in its deliberations, we respectfully submit that the Senate version passed July 26, 1977, will be most effective in achieving the goals and purposes of the proposed legislation.

In closing, the district judges of the Ninth Circuit wish to express our satisfaction with the interest that the Congress has shown in this area of concern.

Sincerely,

EDWARD J. SCHWARTZ.

(g)

THE STATE BAR OF CALIFORNIA,
San Francisco, Calif., August 2, 1978.

HON. PETER W. RODINO,
Chairman, Judiciary Committee,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: The Board of Governors of the State Bar of California at its July 20-21, 1978 meeting considered and took action as follows concerning portions of S. 1613, Magistrate Act of 1977:

Resolved, upon consideration of report of Committee on Federal Courts dated June 27, 1978, re portions of S. 1613, Magistrate Act of 1977, and report of Board Committee on Legislation thereon, that the Board takes the following action:

1. Supports the merit selection of magistrates.
2. Supports provision for reporting of proceeding conducted by a magistrate if a district judge in such a proceeding would have been provided a court reporter.

3. Approves the House version for appeal of a magistrate's decision, modified to provide that at the time the parties consent to referral to a magistrate, they shall elect the manner of appeal, i.e. directly to the Court of Appeals or to the district court with certiorari review in the Court of Appeals.

4. Recommends that a provision be added to permit parties to stipulate to designation of a particular magistrate.

5. Approves in principle the concept that federal magistrates be given jurisdiction over cases involving misdemeanor violations by juvenile youth and young adult offenders, including authority to impose a sentence which includes the expungement provisions applicable to such offenders provided that any period of time in custody may not exceed the maximum sentence specifically provided for the misdemeanor violation; recommends that Congress consider the necessity of also amending Title 18, Section 4209, Chapter 402 (youth offenders) and Chapter 403 (juvenile offenders) in order unambiguously to achieve the result desired with respect to magistrate jurisdiction.

The Board sincerely urges your consideration of these recommendations.

Enclosed is copy of report to the State Bar Committee on Federal Courts above referred to.

Very truly yours,

MARY G. WAILES,
Secretary.

MEMORANDUM

To: Board of Governors, State Bar of California.

From: Federal Courts Committee.

Re Magistrate Act of 1977.

Date: June 27, 1978.

A subcommittee of the Federal Courts Committee consisting of James R. Dunn, Esq. was assigned the task of reviewing the "Magistrate Act of 1977" as passed by the United States Senate (S. 1613) and making recommendations to the Committee for action. Two reports in the form of memoranda to the Committee dated January 6, 1978, and April 21, 1978, were considered before passing on the following resolution. Copies of those memoranda together with copies of S. 1613 as passed by the United States Senate ("Senate version" herein) and the final House Subcommittee markup as of February 28, 1978, ("House version" herein) are attached to this report.

The bill was passed by the full House Judiciary Committee on June 6, 1978, and, according to committee counsel Michael Remington, Esq., will go to the House floor in mid-July, and thereafter to conference committee. It is our hope that the subject will be considered by the Board of Governors at its July meeting.

The Federal Courts Committee did not take a position on all aspects of the bill, but rather dealt only with those sections which it felt were of greatest importance, or might generate the most controversy. At its meeting in San Francisco on June 3, 1978, the Committee unanimously adopted the following resolution:

1. The committee recommends support of the merit selection process for selecting magistrates set forth in the House version of the bill [Sec. 3(a) page 11].

2. The committee recommends that the Board of Governors endorse the section of the House version which provides that any proceeding conducted by a United States Magistrate shall be taken down by a court reporter if a district judge in such a proceeding would have been provided a court reporter. However, the committee recommends that this section be amended to provide that in such proceedings a reporter shall be immediately available only if the parties so request, rather than that a reporter will be available unless the parties agree specifically to the contrary. [Sec. 2(c) (6), page 11].

3. The committee recommends that the Board of Governors endorse the House version for appeal of a magistrate's decision, but with the following modification: at the time the parties consent to referral to a magistrate, they shall elect the manner of appeal (i.e., directly to the Court of Appeals or directly to the district court with certiorari review in the Court of Appeals), subject to later change by stipulation of the parties only. [Sec. 2(c) (3) (4) (5), page 10].

4. The committee recommends that the Board of Governors recommend that the bill allow litigants to stipulate to the designation of a particular magistrate to hear a particular case in order to encourage the use of magistrates.

The committee further would point out to the Board of Governors that there appears to be some ambiguity and potential conflict between the Federal Youth Corrections Act and the provision of the proposed Magistrates Act which allows a magistrate to sentence a youth for no more than one year. This conflicts with the Youth Act which by its inherent terms is an indeterminate sentence of up to a maximum of six years. The committee makes no recommendation on this provision other than to point out the inconsistency to the Board of Governors so that it might point it out to Congress. [See 18 U.S.C. § 5010]

FREDERIC A. SAWYER.

Chairman, State Bar Committee on Federal Courts.

(h)

U.S. DISTRICT COURT,
New York, N.Y., August 4, 1978.

HON. ROBERT W. KASTENMEIER,
Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: The Committee on the Administration of the Magistrates System of the Judicial Conference met last week and of course one of the primary items on its agenda was a discussion of S. 1613.

The Committee strongly urges that if the provisions in the House bill be adopted for selection procedures to be followed in the appointment of magistrates, part time magistrates receiving a salary of \$12,500 or less be excluded from these requirements. This might also be expressed in terms of receiving less than one-quarter of the maximum salary paid to a full time magistrate.

Today part time magistrates receiving such compensation, in the main, handle what used to be known as Commissioners' duties. These involve arrest warrants, search warrants and fixing of bail prior to the filing of formal charges by information or indictment. In many instances, in order to obtain the services of a well qualified lawyer in the community, he has to be personally urged to undertake the assignment because the compensation is relatively low and there are limitations on his private practice imposed by the conflict of interest rules.

I should also point out that the procedure becomes quite cumbersome and expensive (there is no provision for the payment of expenses) when viewed in relation to the small remuneration paid to the appointees in this category. For your information, the following table shows the number of part time magistrates by salary grade who would be affected. At present there is a total of 466 full time and part time magistrates.

83	-----	\$850
48	-----	1, 700
21	-----	2, 550
22	-----	3, 400
23	-----	4, 250
20	-----	5, 950
3	-----	7, 650
9	-----	9, 350
8	-----	11, 050

I trust that this suggestion will receive your serious and earnest consideration.

Respectfully yours,

CHARLES M. METZNER.

(i)

U.S. COURT REPORTERS ASSOCIATION,
Chicago, Ill., October 11, 1978.

HON. ROBERT W. KASTENMEIER,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: On behalf of the United States Court Reporters Association. I wish to take this occasion to express a word of thanks and appreciation for your efforts in the passage of S. 1613, the Magistrate Act of 1978, as amended by the House.

As you know, we were greatly concerned that some provision be made in the bill for the providing of official court reporters, particularly in light of the increased range of duties and the expanded jurisdiction of the magistrates that the bill contemplates. We feel that the final form that the bill took coming out of the House is a proper and just one and we, of course, hope for a favorable result in Conference.

Once again, we thank you for your assistance and cooperation.

Sincerely yours,

RICHARD H. DAGDIGIAN.

(j)

U.S. DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE.
Memphis, Tenn., March 7, 1979.

To the Members of the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice:

GENTLEMEN: As a member of the Committee functioning under the Judicial Conference with respect to the Administration of the Federal Magistrates, I should like to add my endorsement to the testimony of Mr. Margolis, Vice Chairman of the ABA's Judicial Administration Division, with regard to your favorable consideration of the Magistrates Act of 1979 to increase the jurisdiction of the United States Magistrates. I believe that this is a needed improvement in our scheme of justice and I would testify particularly that our Magistrate has been of great help and assistance to the Court in being able to meet the burden of speedy trials and trying to keep up with a trial docket.

My conversation with other Judges persuades me that Magistrates are of great assistance and generally very competent and could handle these matters without depreciation in any way of the rights of the poor and disadvantaged who may appear before the Magistrate.

I would hope that the Committee would also consider that part of the Magistrates Act which would require the Judges' submission of names to a commission for recommendation of persons who might be qualified, with representative members of a committee from the community at large. The Bill should not call for the approval of the Senate or appointment by the Executive Branch as the Magistrates work for and closely with the Courts, which should be most familiar with the abilities and talents of the Magistrate-candidates for appointment.

Thank you for your consideration in this regard.

Yours very sincerely,

HARRY W. WELLFORD.

(k)

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 22, 1979.

HON. ROBERT W. KASTENMEIER,

Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: As a firm believer in the reform of the federal justice system, I am convinced that the approval of H.R. 1046, a bill to expand the jurisdiction of the United States magistrates, is necessary and long overdue.

This bill includes one of the recommendations made by the President in his message to Congress on February 27, 1979 regarding his program to reform the federal civil justice system. I share the President's concern in this area as well as those of the members of the subcommittee. By handling certain judicial chores, magistrates reduced the district court's workload. If this bill is passed by Congress, further relief will be given to the Federal Court's docket.

I commend your initiative and will be supporting the efforts of the subcommittee in passing this legislation. You may count with my assistance and cooperation in this endeavor.

Cordially,

BALTASAR CORRADA, M.C.,
Resident Commissioner, Puerto Rico.

(1)

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
COMMITTEE ON FEDERAL COURTS,
New York, N.Y., June 25, 1979.

HON. WILLIAM CARNEY,
Longworth House Office Building,
Washington, D.C.

Re: Magistrate Act of 1979

DEAR REPRESENTATIVE CARNEY: I am writing on behalf of the Committee on Federal Courts of the Association of the Bar of the City of New York in support of the provisions in H.R. 1046 (the Magistrate Act of 1979) enlarging the civil and criminal jurisdiction of United States magistrates. Our recent study of the magistrate system in the United States District Court for the Southern District of New York (33 The Record 212-30 (1978)) confirmed that the system is an important and valuable component of the federal court structure. We continue to believe that as long as the expansion of magistrate jurisdiction is subject to the consent of the parties (as it would be under H.R. 1046), such expansion is an appropriate legislative step to take at this time.

Although we are not reporting in detail on H.R. 1046 (or its Senate counterpart, S. 237), we would make two general comments.

First, we recommend that the bill be revised to make it clear that magistrates will have the authority to preside over jury trials in misdemeanor cases. We understand that Section 7(2)(D) of H.R. 1046 is designed to accomplish this purpose, but we believe that the language should be more explicit—as it is in Section 2(2) with respect to civil actions.

Second, our Committee continues to oppose any provision which would eliminate or restrict review as of right by the Court of Appeals. Under H.R. 1046 as presently drafted, unless the parties agree in advance to by-pass review by the District Court, an appeal to the Circuit Court would be taken by writ of certiorari and hence would be subject to the Circuit Court's discretion. We recommend instead that appeals be taken directly to the Court of Appeals in all cases involving a judgment entered in an action over which a magistrate has presided. This procedure has the advantage both of preserving the right of review by the Court of Appeals and of eliminating the interjection of the District Court judge as a potential fourth-tier of decisionmaking. It also makes it unnecessary for the Court of Appeals to promulgate and administer a system of rules dealing with petitions for certiorari.

Sincerely yours,

STANDISH F. MEDINA, Jr.

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